STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

GENESEE COUNTY DRAIN COMMISSIONER, JEFFREY WRIGHT,

Plaintiff-Appellee,

and

CHARTER TWP OF FENTON, DENNIS BOW, KARYN MILLER, BONNIE MATHIS, PAULA ZELENKO, MARILYN HOFFMAN, LARRY GREEN, JAKE LaFURGEY, RAY FOUST, DAVID GUIGEAR, ROBERT M. PALMER, RICK CARUSO, WILLIAM W. KOVL, and MAXINE ORR, VILLAGE OF GOODRICH, VILLAGE OF GAINES, VILLAGE OF LENNON, CHARTER TOWNSHIP OF MUNDY, TOWNSHIP OF ARGENTINE, CHARTER TOWNSHIP OF FLINT, CHARTER TOWNSHIP OF MT. MORRIS, TOWNSHIP OF GAINES, AND CITY OF FLUSHING,

Plaintiffs,

v

GENESEE COUNTY, a Michigan municipal corporation

Defendant-Appellant

and

THE GENESEE COUNTY BOARD OF COMMISSIONERS,

Defendant. /

MSC No.

MCOA No. 331023

LC No. 11-97012-CK
(Genesee County Circuit Court)

NOTICE OF FILING APPLICATION

APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

MARY MASSARON (P43885)
HILARY A. BALLENTINE (P69979)
H. WILLIAM REISING (P19343)
PLUNKETT COONEY
Attorneys for Defendant-Appellant
Genesee County
38505 Woodward Ave., Suite 100
Bloomfield Hills, MI 48304
(313) 983-4801
mmassaron@plunkettcooney.com

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TO: Michigan Court of Appeals Clerk
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Defendant-Appellant Genesee County, states that on October 3, 2017, their application for leave to appeal and accompanying documents were filed with the Michigan Supreme Court.

Respectfully submitted,

PLUNKETT COONEY

By: /s/Mary Massaron

MARY MASSARON (P43885)
HILARY A. BALLENTINE (P69979)
H. WILLIAM REISING (P19343)
Attorneys for Defendant-Appellant
Genesee County
38505 Woodward Ave., Suite 100
Bloomfield Hills, MI 48304
(313) 983-4801
mmassaron@plunkettcooney.com

Dated: October 3, 2017

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PLUNKETT COONEY
Attorneys for Defendant-Appellant
Genesee County
38505 Woodward Ave., Suite 100
Bloomfield Hills, MI 48304
(313) 983-4801
mmassaron@plunkettcooney.com

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STATEMENT IDENTIFYING ORDER APPEALED FROM AND DATE OF ENTRY

Defendant-Appellant Genesee County states that this Court has jurisdiction to consider and resolve the instant application pursuant to MCR 7.303(B)(1) (the Court has jurisdiction of a case after decision by the Court of Appeals) and MCR 7.305(H) (the Court may grant or deny the application, enter a final decision, or issue a peremptory order). This Court's jurisdiction has been timely and properly invoked, as evidenced by the following:

- August 22, 2017 decision of the Court of Appeals (**Exhibit 1**); and
- October 3, 2017 application for leave to appeal, timely filed with this Court within the 42-day time period of MCR 7.305(C)(2)(a).

STATEMENT OF THE QUESTION PRESENTED

I.

In *In re Bradley Estate*, 494 Mich 367, 387; 835 NW2d 545 (2013), this Court declined to limit the Governmental Tort Liability Act's application "to suits expressly pleaded as traditional tort claims." Rather, in determining whether a non-traditional tort claim, such as civil contempt, is barred by governmental immunity, *Bradley* instructs that the court must carefully examine the nature of the liability rather than the type of action pleaded.

In a stark departure from *Bradley*, the Court of Appeals held in a published opinion that all unjust enrichment claims sound in contract and thus a claim for unjust enrichment is not barred by governmental immunity.

Should this Court grant leave to appeal to consider whether a claim for unjust enrichment can be predicated on tort law and thus is barred by governmental immunity?

Defendant-Appellant Genesee County says "yes."

Plaintiff-Appellee Genesee County Drain Commissioner, Jeffrey Wright, says "no."

The trial court says "no."

The Michigan Court of Appeals says "no."

STATEMENT OF FACTS

A. Introduction

This is an action for damages arising out of Genesee County Drain Commissioner Jeffrey Wright's ("Plaintiff" or "the Commissioner") allegations that Genesee County ("the County") wrongfully retained refunds from Blue Cross Blue Shield otherwise intended for the Commissioner pursuant to a group health plan. The Commissioner and others brought an action against the County, alleging, in addition to breach of contract, the intentional torts of fraud and conversion. See *Genesee Cty Drain Comm'r v Genesee Cty*, 309 Mich App 317, 320; 869 NW2d 635 (2015). The trial court's order to allow the tort claims to proceed to trial was reversed by the Michigan Court of Appeals, *id*. at 332, and Plaintiff was prohibited from seeking compensation for contract damages that accrued before October 24, 2005.

On remand, the Commissioner moved for leave to file a second amended complaint in order to add a cause of action against the County for unjust enrichment. The trial court rejected the County's argument that the unjust enrichment claim was seeking compensatory damages for a noncontractual civil wrong, and therefore, was barred by governmental immunity. The Court of Appeals affirmed in a published opinion, holding that unjust enrichment is an "equitable doctrine" in which the law implies a contract, and thus "involves contract liability, not tort liability." **Exhibit 1**, p 3. In so doing, the Court of Appeals completely evaded the County's argument that Plaintiff was simply relabeling his conversion and fraud claims as "unjust enrichment" to avoid governmental immunity. While the Court of Appeals cited *In re Bradley Estate*, 494 Mich 367, 387; 835 NW2d 545 (2013) for its interpretation of the "tort liability", it failed to undertake any meaningful analysis of whether Plaintiff's claim actually sounds in tort – regardless of the language

used in the complaint. *Bradley* instructs that when determining whether a claim sounds in "tort," the focus "must be on the nature of the liability rather than the type of action pleaded[.]" *Id*. at 387. Had the Court of Appeals undertaken a proper analysis under *Bradley*, it would have concluded that Plaintiff's claim sounds in tort and reversed the trial court's ruling with instructions to grant summary disposition to the County on the basis of qualified immunity.

The County challenges the Court of Appeals' decision in this application.

B. Material facts

The County, the Commissioner, and the Genesee County Community Mental Health Agency purchased group (or "cluster") health insurance coverage from Blue Cross Blue Shield of Michigan (referred to as the "plan group").[1] **Exhibit 2**, Second Amended Complaint, ¶ 7. Employees of each member of the plan group participated in the Blue Cross Plan. *Id*., ¶ 11. The Commissioner paid for the health insurance premiums of the Drain Commission employees so that they would be provided health insurance coverage. *Id*., ¶¶ 13-16, 30.

Blue Cross audited the claims under the plan and would then establish premiums for health insurance coverage for the following year. **Exhibit 2**, Second Amended Complaint, ¶ 17. At the end of each plan year, Blue Cross would provide an annual settlement accounting statement of premiums paid and plan expenses incurred. For all of the plan years from 2001 through 2008, the Blue Cross annual settlement accounting

[1] The following facts are taken from the allegations in the Commissioner's complaint and were accepted as true only for purposes of the County's motion for summary judgment and appeal.

revealed that premiums paid for the plan exceeded claims paid, administration expenses, and necessary reserves for such plan year. *Id*., ¶¶ 19-20. When a surplus occurred, Blue Cross gave the option of a credit toward the next plan year or a refund. *Id*., ¶ 21. In years where the County opted for a refund, Blue Cross issued refund checks to Genesee County, which were deposited in the County's general fund. *Id*., ¶¶ 22, 26-27.

C. Material proceedings

1. The plaintiffs' original suit pleaded claims for the intentional torts of fraud and conversion, which the Court of Appeals ultimately held were barred by governmental immunity

The Commissioner and others brought an action against the County, alleging, in addition to breach of contract, the intentional torts of fraud and conversion. See *Genesee Cty Drain Comm'r v Genesee Cty*, 309 Mich App 317, 320; 869 NW2d 635 (2015). The trial court determined that (1) the plaintiffs' breach of contract claim could only recover damages for actions that accrued after October 24, 2005, under the six-year limitations period specified in MCL 600.5807(8); and (2) the defendants'[2] status as governmental entities did not give them immunity from intentional tort claims. *Id*. at 322-323. An appeal followed in which the Court of Appeals considered whether the plaintiffs could assert intentional tort claims "against a governmental-agency defendant that committed the alleged torts while engaged in the exercise of a governmental function." *Id*. at 329-330. The Court of Appeals held:

> [T]he provision and administration of health insurance benefits to public employees via an interagency agreement is plainly a governmental function. The alleged intentional torts committed by defendants were specific acts or decisions that occurred as part of the "general activity" of this governmental function. Defendants are therefore immune from tort liability for any intentional torts they committed in the provision and administration of

[2] The Genesee County Board of Commissioners was also a defendant.

> health insurance benefits to public employees, and plaintiffs are barred from asserting intentional tort claims based on defendants' action in this context.

Id. at 330-31 (citations omitted). The Court of Appeals thus reversed the trial court's order allowing the tort claims to proceed to trial. *Id*. at 332. The Court of Appeals affirmed the trial court's ruling that the plaintiffs' breach of contract claim could not seek compensation for damages that accrued before October 24, 2005.

2. Seeking to continue their claims, the Commissioner relabeled his fraud and conversion claims as a new claim for unjust enrichment

On remand, the Commissioner moved for leave to file a second amended complaint in order to add a cause of action against the County for unjust enrichment. **Exhibit 3**, Motion for Leave to File Second Amended Complaint and Brief in Support. The Commissioner asserted that the six-year statute of limitations period under MCL 600.5813 applied to the proposed unjust enrichment claim; and thus the trial court's earlier decision to limit recovery under the existing breach of contract claim to within the six-year statute of limitations period would also apply to the new unjust enrichment claim. *Id*., p 3. The County responded, arguing that a claim for unjust enrichment could have been included in the original pleading or the first amended complaint. Further such a claim was seeking compensatory damages for a noncontractual civil wrong, and therefore, it was futile because it was barred by governmental immunity. **Exhibit 4**, County's Response to Motion to Amend. After a hearing on the Commissioner's motion, the trial court determined that a claim for unjust enrichment sounded in contract and thus entered an order granting leave to file the second amended complaint. Tr 10/5/15, p 12; **Exhibit 5**, 10/5/15 Order.

The Commissioner filed the second amended complaint, asserting that the County's failure to provide a portion of the refunds to the Genesee County Drain Commissioner

constituted a breach of contract between the County and the Commissioner (Count I). **Exhibit 2**, Second Amended Complaint, ¶¶ 36-41. The Commissioner also asserted that the County wrongfully and unjustly retained the portion of the refunds that belonged to the Commissioner, and such conduct was inequitable and amounted to unjust enrichment (Count II). *Id*., ¶¶ 42-47.

The County moved for partial summary disposition under MCR 2.116(C)(7) and (C)(8), first arguing that the Commissioner's unjust enrichment claim asserted tort liability and therefore it was barred by governmental immunity under MCL 691.1407(1). **Exhibit 6,** County's Motion for Summary Disposition, p 10. Even if a claim of unjust enrichment is more in the nature of an implied contract, it was properly dismissed because it was duplicative of the breach of contract claim. *Id*., p 12. Nonetheless, the nature of the allegations plainly demonstrated that the Commissioner was asserting that the County's wrongful conduct harmed the Commissioner, and therefore, he was asserting a tort claim barred by governmental immunity. *Id*., pp 12-13.

The County also argued that the Commissioner could not establish a claim of unjust enrichment because the County did not receive a benefit to the Commissioner's detriment. **Exhibit 6,** County's Motion for Summary Disposition, p 13. The refund the County received was from Blue Cross pursuant to the contract; the County did not receive and retain a benefit from the Commissioner. *Id*. Further, the Commissioner was fully compensated for the funds expended for the health care plan premiums. The Commissioner agreed to pay a certain amount for health care premiums for health benefits for his workers, and the Commissioner received those benefits. *Id*., pp 13-14. Therefore, the unjust enrichment claim should be dismissed as a matter of law.

The Commissioner responded that Governmental Tort Liability Act did not preclude or bar implied contract claims, nor did the act apply to equitable claims, and therefore, the County was not entitled to summary disposition. **Exhibit 7,** Commissioner's Response to Motion for Summary Disposition, pp 6-9. The Commissioner also argued that he had sufficiently pleaded a case for unjust enrichment because the County kept and used money belonging to the Commissioner. *Id*., pp 10-11.

The County replied that, in *In re Bradley Estate*, 494 Mich 367, 386; 835 NW2d 545 (2013), the Supreme Court held that the "tort liability" contemplated in the Governmental Tort Liability Act is "all legal responsibility arising from a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages." This definition included a claim of unjust enrichment, which is a noncontractual civil wrong. **Exhibit 8,** County's Reply Brief in Support of Motion for Summary Disposition, pp 1-2. Tellingly, the Commissioner was not seeking an injunction or other equitable relief, but rather, money damages. *Id*., p 3. Thus, the commissioner was claiming tort liability, barred by governmental immunity. *Id*.

After hearing arguments on the County's motion, the trial court again determined that "in an unjust enrichment claim, the law implies a contract to prevent inequity," and therefore, the "governmental tort liability act does not apply" to the Commissioner's unjust enrichment claim. Tr 12/14/15, p 15. The court entered a corresponding order denying partial summary disposition. **Exhibit 9**, 12/28/15 Order.

3. In a published opinion, the Court of Appeals held that unjust enrichment is an equitable doctrine involving contract – not tort – liability, and that plaintiffs can therefore circumvent governmental immunity simply by relabeling their tort claims as unjust enrichment

The County appealed to the Court of Appeals, arguing that the trial court erred in not looking behind the label of the Commissioner's pleadings to examine the nature of the allegations, which clearly sound in tort and thus entitle the County to governmental immunity. The County pointed out that under Supreme Court precedent, the focus "must be on the nature of the liability rather than the type of action pleaded[.]" (Appellant Brief, p 10, citing *In re Bradley Estate*, 494 Mich 367, 385; 835 NW2d 545 (2013)). Under *Bradley's* direction that the application of the GTLA is not limited "to suits expressly pleaded as traditional tort claims[,]" *Id*. at 387, the County argued that both the nature of the duty alleged and liability which formed the basis for the Commissioner's "unjust enrichment" claim sound in tort liability because it alleges wrongful conduct which harmed the Commissioner. (Appellant Brief, pp 12-13). The County stressed that the second amended complaint containing the unjust enrichment claim *does not* seek to recover contract damages from the County by the Commissioner's performance of services that the County agreed to pay for. Rather, the suit seeks damages for purportedly wrongful conduct. Accordingly, because the unjust enrichment claim, when examined beyond its label, asserted tort liability, the County was entitled to governmental immunity. *Id*., p 13.[3]

[3] Additionally, the County argued that any unjust enrichment claim fails as a matter of law because the County did not receive a benefit directly from the Commissioner. (Appellant Brief, pp 13-17). The Court of Appeals ultimately declined to address this argument, but noted in its opinion that "Defendant is, however, free on remand to renew its motion for summary disposition under MCR 2.116(C)(8) based upon a failure to state a
(cont'd next page)

The crux of the Commissioner's argument on appeal was that the "equitable claim of unjust enrichment implies a contract to prevent inequity or unjust enrichment between Plaintiff and Defendant, which does not assert 'tort liability' and is not barred by the GTLA." (Appellee Brief, p 7). Relying on unpublished case law, the Commissioner claimed that "[t]he restitution Plaintiff seeks is not the type of damages that are sought under 'tort liability' claims." *Id*., p 11. The Commissioner attempted to distinguish *Bradley* by arguing that it "only addressed the applicability of the GTLA under a civil contempt statute, coupled with wrongful death allegations, which are not relevant to the claim in this action." *Id*.

In reply, the County argued that the Commissioner's attempt to distinguish *Bradley* from this case is unpersuasive. (Reply Brief, 8/18/16, p 2). The County stressed that the takeaway from *Bradley* is not whether the Supreme Court specifically ruled that unjust enrichment is a tort; instead, what *Bradley* instructs is that when determining whether a claim sounds in "tort," the focus "must be on the nature of the liability rather than the type of action pleaded" in the plaintiff's complaint. *Id*. The County argued that here, as in *Bradley*, where the claimed wrong is not premised on a breach of a contractual duty, but alleges wrongful conduct that causes harm (here, allegedly to the Commissioner), the claim sounds in tort. *Id*.

In a published opinion, the Michigan Court of Appeals ruled that unjust enrichment "involves contract liability, not tort liability. It merely involves a situation in which the contract is an implied one imposed by the court in the interests of equity rather than an

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claim for unjust enrichment so that the trial court may address it in the first instance." **Exhibit 1**, p 3.

express contract " **Exhibit 1**, p 3. Accordingly, the Court of Appeals held that the Commissioner's claim was not barred by governmental immunity. *Id*. In so holding, the Court of Appeals completely overlooked this Court's instruction in *Bradley* that the determination of whether a particular claim sounds in tort requires the court to look beyond the label used in a plaintiff's complaint and focus on the nature of the liability. In fact, the Court of Appeals discussed *Bradley* only with respect to its definition of "tort" and "tort liability." *Id*. The Court of Appeals did not engage in any meaningful analysis of whether the true nature of the Commissioner's claim, while titled "unjust enrichment," actually alleged a noncontractual civil wrong, and thus a tort for purposes of governmental immunity. *Id*.

The County now appeals this ruling.

THE NEED FOR SUPREME COURT REVIEW

Michigan's broad immunity protects governmental parties from the distractions and expenses of defending tort lawsuits filed against them in the same way that the doctrine of sovereign immunity has historically protected the state. See generally *Ross v Consumers Power Co,* 420 Mich 567, 596; 363 NW2d 641 (1984). This Court emphasized that governmental immunity "protects the state not only from liability, but from the great public expense of having to contest a trial." *Odom v Wayne County*, 482 Mich 459, 478; 760 NW2d 217 (2008). The statute also is predicated on the theory that governmental parties engage in a great deal of risky conduct in the course of serving the public, often are seen as deep-pocket defendants, and lawsuits against them may serve to deter useful and socially desirable conduct because of the risk of suit. To guard against this, the Legislature enacted broad protections for governmental parties of all kinds. The statute was intended to protect governmental parties against the burdens of discovery and trial, as well as against the potential for liability. *Id.* at 47. It is also grounded on the notion that arguments about the governmental entity's purportedly wrongful conduct have a remedy through the political process.

In order to facilitate these goals, a plaintiff seeking to maintain an action against a governmental agency or its employees exercising a governmental function *must* plead in avoidance of governmental immunity. *County Road Ass'n of Mich v Governor*, 287 Mich App 95, 119; 782 NW2d 784 (2010). And a plaintiff cannot simply avoid governmental immunity by crafty labeling or artful pleading. A tort claim cast as a claim for "unjust enrichment" is insufficient to circumvent the broad grant of immunity. This Court made this point clear in *In re Bradley Estate*, 494 Mich 367; 835 NW2d 545 (2013), when it

instructed in determining whether a claim sounds in "tort," the focus "must be on the nature of the liability rather than the type of action pleaded[.]" *Id*. at 387. Here, as in *Bradley*, where the claimed wrong is not premised on a breach of a contractual duty, and the complaint alleges wrongful conduct which causes harm (here, allegedly to the Commissioner), the claim sounds in tort. *Id*. at 383-84.

In a complete departure from *Bradley*, the Court of Appeals held in a published opinion that a claim "based upon a theory of unjust enrichment" is not barred by the doctrine of governmental immunity, without so much as a passing glance at the nature of liability alleged. **Exhibit 1**. In the Court of Appeals' view, because unjust enrichment is an equitable doctrine based not on the existence of an express contract but rather on a contract implied in law, such a claim "involves contract liability, not tort liability." *Id*., p 2. Completely missing from the Court of Appeals' analysis is a careful examination of the nature of the liability alleged by the Commissioner in order to determine whether the claim actually sounds in tort and is simply labeled "unjust enrichment" to avoid governmental immunity.

Left to stand, the Court of Appeals' opinion threatens to expose governmental agencies to liability simply because the plaintiff affixes an "unjust enrichment" label to what is clearly a tort claim. In the Court of Appeals' view, unjust enrichment "involves contract liability, not tort liability[,]" and as such is not barred by the GTLA. Not only is this flatly inconsistent with *Bradley*, it is also inconsistent with longstanding Michigan principles of law that evaluate the gravamen of a situation, not merely the title. Absent review from this Court, opportunistic plaintiffs will use the Court of Appeals' published decision as a roadmap to plead unjust enrichment or some other "equity"-based claim in

order to avoid the application of governmental immunity. This will, in turn, significantly undermine the protections of governmental immunity and create a host of problems for governmental agencies.

The need for this Court's guidance is exemplified by the fact that, just two days after the decision in this case was issued, the Court of Appeals issued an unpublished decision reaching the completely opposite conclusion. *Shears v Bingaman*, unpublished opinion per curiam of the Court of Appeals, Docket No. 329976 (August 24, 2017). **Exhibit 10**. The panel in *Shears* (which included one of the same judges in this case) held that the plaintiffs' claim for unjust enrichment was based in either tort or constitutional law and thus was barred by governmental immunity. Correctly so, the *Shears* Court examined the nature of the liability rather than the type of action pleaded – as *Bradley* commands – and concluded that "neither the substance nor the form of the complaint at issue here includes an unjust-enrichment claim as argued by plaintiffs and found by the circuit court." *Id*. at *4. However, the conflicting decisions reached in *Shears* and the instant case evidence confusion about the manner in which a claim for unjust enrichment should be evaluated and the takeaway from *Bradley* as applied to a claim for unjust enrichment (as opposed to a claim for civil contempt, the claim at issue in *Bradley*). Absent review from this Court, governmental parties will be left with no clear standard upon which to judge their conduct. This difficulty in predicting outcomes results in increased litigation costs and funnels down to governmental parties in the form of spiked insurance costs.

For the reasons stated above, this case easily satisfies the grounds for this Court's review. MCR 7.305(B). This Court should either peremptorily reverse the Court of Appeals' published decision, or alternatively grant leave to appeal.

ARGUMENT

This Court Should Grant Leave To Appeal To Consider Whether A Claim For Unjust Enrichment Can Be Predicated On Either Tort Or Contract Law, Depending On The Nature Of The Liability Involved, Thus Requiring Courts To Undertake A Case-By-Case Analysis To Determine Whether A Particular Unjust Enrichment Claim Sounds In Tort And Thus Is Barred By Governmental Immunity

A. Under Michigan's broad governmental immunity, governmental agencies like Genesee County are immune from tort liability while engaged in the exercise or discharge of a governmental function

Pursuant to the Governmental Tort Liability Act, MCL 691.1401, *et seq*., "[e]xcept as otherwise provided . . . all governmental agencies shall be immune from tort liability in all cases wherein the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). MCL 691.1401(f) defines a "governmental function" as "an activity which is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance or other law." Michigan courts have repeatedly held that this definition of governmental function is to be broadly applied. *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 614; 664 NW2d 165 (2003); *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 97; 494 NW2d 791 (1992); *Herman v City of Detroit*, 261 Mich App 141, 144; 680 NW2d 71 (2004). To show that the activity is a governmental function only requires some constitutional, statutory, or other legal basis for the activity in which the agency was engaged. *Adam*, 197 Mich App at 97.

This Court previously determined that "the provision and administration of health insurance benefits to public employees via an interagency agreement is plainly a governmental function." *Genesee Cty Drain Comm'r*, 309 Mich App at 330. Thus, the tort claims brought by the Commissioner – fraud and conversion – were properly dismissed. *Id*.

at 321. The Commissioner then amended his complaint to allege the same wrongful conduct, but under the new label of "unjust enrichment." But the nature of the wrong alleged remains tortious conduct for which the Commissioner seeks money damages.[4] Therefore, the County is entitled to governmental immunity and the trial court and Court of Appeals erred in denying partial summary disposition.

B. A claim based on unjust enrichment can be predicated on either tort or contract law, requiring the court to engage in a case-by-case analysis to assess the nature of the injury and the relief requested

This Court recently considered the meaning of the phrase "tort liability" for purposes of the GTLA and held that the term "encompasses all legal responsibility for civil wrongs, other than a breach of contract, for which a remedy may be obtained in the form of compensatory damages." *In re Bradley Estate*, 494 Mich 367, 371; 835 NW2d 545 (2013). In *Bradley*, deputies from the Kent County Sheriff's Department failed to timely execute an order to take an individual into protective custody and the individual subsequently committed suicide. Patricia Bradley, the decedent's sister who had petitioned for him to be taken into protective custody, then brought a wrongful death action in the circuit court against the Kent County Sheriff and his department. The suit was dismissed on grounds of governmental immunity. *Id*. at 373-374. Bradley next filed a petition for civil contempt in the probate court alleging that the deputies were grossly negligent in their failure to

[4] The Commissioner is clearly re-pleading his previously-dismissed conversion claim in an effort to circumvent immunity. To be sure, the conversion claim contained in the Commissioner's First Amended Complaint alleged that the County wrongfully "retained the funds" belonging to the Commissioner for its own benefit. (First Amended Complaint, ¶¶ 68-75). The Commissioner's unjust enrichment claim as set forth in his Second Amended Complaint pleads that the County "wrongfully and unjustly retained" a portion of the funds that belong to the Commissioner. (Second Amended Complaint, ¶¶ 42-45).

execute the probate court order and that their negligence was the proximate cause of her brother's death. *Id*. at 374. The probate court denied the Sheriff's motion for summary disposition on ground of immunity, but the circuit court reversed, concluding that Bradley's civil contempt petition was based in tort because the petition sought damages under the wrongful death statute.

This Court agreed, finding that the term "'tort' as used in MCL 691.1407(1) is a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages." *Id.* at 385. The Court further noted that the statute did not refer merely to "tort" but to "tort liability." *Id*. Accordingly,

> Construing the term "liability" along with the term "tort," it becomes apparent that the Legislature intended "tort liability" to encompass legal responsibility arising from a tort. We therefore hold that "tort liability" as used in MCL 691.1407(1) means all legal responsibility arising from a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages.

Id. Importantly, the Court instructed that the focus "must be on *the nature of the liability rather than the type of action pleaded*," and therefore, the application of the GTLA is not limited "to suits expressly pleaded as traditional tort claims . . . ." *Id*. at 387 (emphasis added). The Court referenced well-established law that "the gravamen of a plaintiff's action is determined by considering the entire claim." *Id*. at 388 n 49 (citation and punctuation omitted). Thus, "some causes of action that are not traditional torts nonetheless impose tort liability within the meaning of the GTLA." *Id*.

Accordingly, a court considering whether a claim involves tort liability "should first focus on the nature of the duty that gives rise to the claim." *Id*. at 389. "[I]f the wrong is not premised on a breach of a contractual duty, but rather is premised on some other civil wrong, i.e., some other breach of a legal duty, then the GTLA might apply to bar the claim."

Id. The court must next consider "the nature of the liability the claim seeks to impose. If the action permits an award of damages to a private party as compensation for an injury caused by the noncontractual civil wrong, then the action, no matter how it is labeled, seeks to impose tort liability and the GTLA is applicable." *Id*.

Specifically, in *Bradley*, this Court held that the civil contempt action was a tort suit for money damages and thus the Sheriff and his department were entitled to governmental immunity. The contempt statute, MCL 600.1721[5], "requires a showing of contemptuous misconduct that caused the person seeking indemnification to suffer a loss or injury and, if these elements are established, requires the court to order the contemnor to pay 'a sufficient sum to indemnify' the person for the loss." *In re Bradley Estate*, 494 Mich at 391. The Court also noted that the language of the contempt statute "authorizes a court to order a contemnor to 'indemnify' the petitioner for the loss caused by the contemptuous misconduct," and therefore, "the statute clearly sanctions legal responsibility, or liability, in the form of compensatory damages" and allowed for "what is, in essence, a tort suit for money damages." *Id*. at 392.

In this case, the Commissioner's Count II is labeled unjust enrichment, which the trial court found to be in the nature of contract, or more specifically, implied contract. Tr 12/14/15, p 15. But as noted, "[i]t is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural

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[5] MCL 600.1721 provides:

> If the alleged misconduct has caused an actual loss or injury to any person the court shall order the defendant to pay such person a sufficient sum to indemnify him, in addition to the other penalties which are imposed upon the defendant. The payment and acceptance of this sum is an absolute bar to any action by the aggrieved party to recover damages for the loss or injury.

labels to determine the exact nature of the claim." *Adams v Adams*, 276 Mich App 704, 710-11; 742 NW2d 399 (2007). "Courts are not bound by the labels that parties attach to their claims." *Buhalis v Trinity Continuing Care Svcs*, 296 Mich App 685, 691; 822 NW2d 254 (2012). To the contrary, the law requires courts to look past the label chosen by the plaintiff to the substance of the claim asserted. *Local 1064, RWDSU AFL-CIO v Ernst & Young*, 449 Mich 322, 327 n 10; 535 NW2d 187 (1995) (stating that "in ruling on a statute of limitations defense the court may look behind the technical label…to the substance of the claim asserted."); *Attorney General v Mereck Sharp & Dohme Corp*, 292 Mich App 1, 9; 807 NW2d 343 (2011) ("a court is not bound by a party's choice of labels."). Similarly, courts must look past the title a plaintiff affixes onto a claim to determine whether it falls within the definition of "tort liability." The Court of Appeals' opinion in this case represents a drastic departure from this principle.

C. Count II of the Second Amended Complaint asserts tort liability from which the County is immune under the Governmental Tort Liability Act

Under the theory of unjust enrichment, a person who has received a benefit from another person is liable to pay for the benefit *only if* the circumstances of the retention of the benefit are such that, as between the two persons, it is unjust for the person to retain the benefit. *Dumas v Auto Club Ins. Ass'n.*, 437 Mich 521, 546; 473 NW2d 652 (1991), citing, *Restatement Restitution*, § 1, comment c, p. 13. Had the Court of Appeals applied the analysis set forth in *Bradley*, it first would have considered the nature of the duty alleged. Here, the Commissioner is alleging that the County had a duty to provide it with a refund that came from Blue Cross. Thus, the nature of any duty owed by the County to the Commissioner is one to provide restitution for a benefit that was, allegedly, unjustly retained by the County. This is a noncontractual duty.

Next, turning to the nature of the liability, the allegations in Count II of the second amended complaint clearly state that the County engaged in wrongful conduct that harmed the Commissioner, and thus caused damages. The second amended complaint states as follows:

> 43. Genesee County *wrongfully and unjustly retained* a portion of the refunds under the Blue Cross Plan that belong to Genesee County Drain Commissioner.
>
> 44. Genesee County is not entitled to retain Genesee County Drain Commissioner's portion of the refunds issued under the Blue Cross Plan.
>
> 45. Due to Genesee County's *wrongful retention* of Genesee County Drain Commissioner's portion of the refunds, Genesee County has been unjustly enriched.
>
> 46. It is inequitable for Genesee County to retain Genesee County Drain Commissioner's portion of the refunds issued under the Blue Cross Plan.
>
> 47. Genesee County Drain Commissioner has been harmed by Genesee County's *inequitable retention* of its refunds.

Exhibit 2, Second Amended Complaint (emphasis added). The allegations above constitute a classic conversion[6] claim, which the Commissioner pleaded in his First Amended Complaint. (First Amended Complaint, ¶¶ 68-75). Specifically, the Commissioner pleaded that the County's retention of funds and use of those funds "for its own benefit" amounted to conversion of the funds for its own use. *Id*. However, the Court of Appeals concluded that the Commissioner's conversion claim pleaded an intentional tort and thus was barred by governmental immunity, See *Genesee Cty Drain Comm'r v Genesee Cty*, 309 Mich App 317,

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[6] Common law conversion "is any distinct act of dominion wrongfully exerted over another person's personal property." *Pamar Enterprises Inc v Huntington Banks of Mich*, 228 Mich App 727, 734; 580 NW2d 11 (1998).

320; 869 NW2d 635 (2015). Now, the Commissioner attempts, through artful pleading, to recast his tort claim for conversion into one for unjust enrichment, to evade the reach of governmental immunity.

Nevertheless, the nature of the liability asserted in the Commissioner's Count II (labeled as unjust enrichment) is tort liability, because it alleges wrongful conduct which harmed the Commissioner. Further, the complaint clearly seeks compensatory damages for the County's alleged conduct in wrongfully retaining the refunds. The Commissioner asserts that he is entitled to "a portion of the refund based upon its participation in the Blue Cross Plan." Second Amended Complaint, ¶31. But the Commissioner is seeking those funds which came from Blue Cross and which the County allegedly wrongfully retained. The second amended complaint *does not* seek to recover contract damages from the County for some performance by the Commissioner for which the County has agreed to provide compensation. As the courts have "repeatedly recognized . . . when a party breaches a duty stemming from a legal obligation, other than a contractual one, the claim sounds in tort." *In re Bradley Estate*, 494 Mich at 383-84. Count II of the Second Amended Complaint thus asserts tort liability from which the County is entitled to governmental immunity, and therefore, the Court of Appeals erred in denying the County's motion for summary disposition.

D. Courts around the country have held that claims for unjust enrichment oftentimes sound in tort and thus are barred by governmental immunity

The issue of whether all unjust enrichment claims sound in tort is an issue of first impression in Michigan. While *Bradley* determined that the court must review the nature of the liability in order to determine whether a claim sounds in tort, *Bradley* involved civil contempt, not unjust enrichment. Accordingly, the County offers the analyses of other

courts in the nation who have concluded, correctly so, that a claim for unjust enrichment may sound in tort, and not contract, liability. See *Blakeslee v Farm Bureau*, 388 Mich 464, 470-473; 201 NW2d 78 (1972) (in matters of first impression, the court may consider the interpretation of other courts).

The conclusion that a claim based on unjust enrichment can be predicated on either tort or contract law is not a novel one. Courts around the country have reached this exact conclusion. For example, in *Westwood Pharms, Inc v Nat'l Fuel Gas Distrib Corp,* 737 F Supp 1272, 1284–85 (WDNY1990), the court, applying New York law, held that an unjust enrichment claim predicated on the defendants' intentional or negligent acts sounded in tort. The Iowa Supreme Court similarly concluded that the doctrine of unjust enrichment "may arise from contracts, torts, or other predicate wrongs[.]" *State, Dep't of Human Servs. ex rel Palmer v Unisys Corp,* 637 NW2d 142, 154 (Iowa 2001).

In *Peddinghaus v Peddinghaus,* 295 Ill App 3d 943; 230 Ill Dec 55; 692 NE2d 1221, 1225 (1998), the Appellate Court of Illinois, First District, rejected the defendants' argument that "the doctrine of unjust enrichment is based on an implied or quasi-contract and, therefore….has no application when, as here, a specific contract (the purchase agreement) exists which governs the relationship of the parties." *Id*. at 1226. In the *Peddinghaus'* Court's view, "unjust enrichment may be predicated on either quasi-contract or tort." *Id*. In that case, which was based on an alleged fraudulent inducement to sell shares of a trust, the Court held that the plaintiff "bases his unjust enrichment claim on a tort theory[.]" *Id*. Similarly, in *Blusal Meats, Inc v United States,* 638 F Supp 824, 832 (SDNY 1986), a New York federal court held that the plaintiff's unjust enrichment claim was predicated on tort and that it was therefore subject to the statute of limitations for tort

actions. In so ruling, the *Blusal* Court, like the *Peddinghaus* Court, looked to the factual basis underlying the claim. *Id*.; *Peddinghaus,* 230 Ill Dec 55; 692 NE2d at 1225.

Robinson v Colorado State Lottery Div, 179 P3d 998 (2008), provides perhaps the best illustration of the analysis the Court of Appeals should have taken in this case. In *Robinson*, the Supreme Court of Colorado, sitting *en banc*, held that a lottery ticket buyer's claim of unjust enrichment sounded in tort and was thus barred by the Colorado Governmental Immunity Act. The plaintiff in *Robinson* contended that the Colorado State Lottery Division and the Colorado State Lottery Commission (collectively, "the Lottery") continued to sell scratch tickets months after all the represented and advertised prizes were awarded. The plaintiff framed her complaint in both contract and quasi-contract, arguing that she brought scratch tickets with the belief, based on the Lottery's representations, that she had a chance to win certain represented prizes and that she did not receive the chance to win for which she had contracted. *Id*. at 1001. The Lottery moved to dismiss on the basis that the claims "lie in tort or could lie in tort" and thus were barred by the Colorado Governmental Immunity Act, and the trial court granted that motion. *Id*. On appeal, the court of appeals affirmed.

The Supreme Court of Colorado granted certiorari "to review whether [the plaintiff's] claims lie in tort or could lie in tort and are therefore barred" by governmental immunity, and ultimately held that "[b]ecause the underlying injury asserted in [the plaintiff's] claims arises out of the alleged misrepresentation of certain facts by the Lottery, we find that Robinson's claims lie in tort or could lie in tort for the purposes of governmental immunity. Thus, they are barred by the CGIA." *Id*. In so ruling, the *Robinson* Court first noted that "the form of the complaint is not determinative of the claim's basis in

tort or contract." *Id*. at 1003. Rather, "a court must consider the nature of the injury and the relief sought." *Id*. Turning to the unjust enrichment claim, the *Robinson* Court explained that "[t]he scope of the remedy is broad, cutting across both contract and tort law, with its application guided by the underlying principle of avoiding the unjust enrichment of one party at the expense of another." *Id*. at 1007. Accordingly, the *Robinson* Court held that in order to determine whether a claim pleaded as unjust enrichment is really predicated in tort, and thus barred by governmental immunity, a "case-by-case analysis" must be applied in which the court examines "the nature of the injury and the relief requested":

> *Because an unjust enrichment claim can be predicated on either tort or contract, we apply the same case-by-case analysis to an unjust enrichment claim as we have done with other claims, assessing the nature of the injury and the relief requested*. See *Berg*, 919 P.2d at 259; *DeLozier*, 917 P.2d at 715. Here, Robinson's unjust enrichment claim requires a showing that it would be unjust for the Lottery to retain the money spent by Robinson on scratch tickets when the represented prizes were no longer available. However, to show injustice, Robinson necessarily relies on allegations that she was induced into the purchase of scratch tickets by the Lottery's alleged misrepresentations that certain prizes remained available.

Id. at 1008 (emphasis added). Upon careful review of the injury alleged, the *Robinson* Court noted that the plaintiff's claimed was "predicated on tortious conduct" and thus was barred by governmental immunity:

> Once again, we are presented with an injury which appears to be based on tortious conduct or the breach of a duty actionable in tort. *Thus, because this unjust enrichment claim is predicated on tortious conduct and the nature of the injury arises out of a misrepresentation, this claim lies in tort or could lie in tort for the purposes of the CGIA*.

Id. at 1008 (emphasis added).

The *Robinson* Court further explained that the mere fact that the plaintiff requested "equitable relief in the form of recession does not deter our conclusion that this particular

unjust enrichment claim for equitable relief lies in tort." *Id*. As the *Robinson* Court noted, the relief requested is not dispositive of whether a claim sounds in tort or contract:

> *Although the relief requested informs our understanding of whether the injury is tortious in nature, it is not dispositive of the claim's underlying basis in tort or contract.* Robinson seeks restitution of the Lottery's profits on scratch tickets sold after the represented prizes were no longer available*. Although this relief is labeled restitution, it is in effect the equivalent of damages that Robinson could plead in tort—money expended on lottery tickets when the Lottery misrepresented certain facts in order to induce Robinson to purchase the tickets. Thus, in this particular instance, where the nature of the injury underlying the unjust enrichment claim arguably arises out of tortious conduct and the request for relief is effectively equivalent to the damages that Robinson could seek in tort, the claim lies in tort or could lie in tort.* Accordingly, Robinson's unjust enrichment claim is barred by the CGIA.

Id. at 1008 (emphasis added).

Robinson and the other above-cited cases make clear that a court presented with a "non-traditional tort claim" must examine the nature of the injury and the relief requested to determine whether the claim, however pleaded, sounds in tort. Just as the *Robinson* plaintiff's injury was based on tortious conduct or the breach of a duty actionable in tort, here too the Commissioner's claim is predicated on breach of a duty to provide any refunds to the county health plan participants. Just as in *Robinson*, because the alleged unjust enrichment claim "is predicated on tortious conduct" and the nature of the injury arises out of a noncontractual civil wrong, the Commissioner's claim "lies in tort or could lie in tort" for purposes of Michigan's Governmental Tort Liability Act." *Robinson*, *supra*, at 1008. Moreover, as the *Robinson* Court explained, the specific relief in the Commissioner's second amended complaint is effectively equivalent to the damages that the Commissioner could seek in tort, providing further support that the Commissioner's unjust enrichment claim lies in tort and is barred by governmental immunity. *Id*. In short, regardless of how labeled, the Commissioner's claim sets forth a tort claim. Had the Court of Appeals looked past the

label affixed to the Commissioner's complaint, and examined the nature of the liability as *Bradley*, *Robinson*, and numerous other cases instruct, it would have seen that the Commissioner alleges a civil wrong. Genesee County therefore should be protected with immunity from tort liability. Only a reversal of the Court of Appeals' erroneous decision can achieve this desired result.

E. Conclusion

Peremptory reversal, or a grant of leave to appeal, is further necessary to clarify the confusion currently permeating in the Court of Appeals on this issue. Just two days after the Court of Appeals' decision in this case, another panel of the Court of Appeals held that the plaintiff's claim for unjust enrichment sounded in tort and thus was barred by governmental immunity. *Shears v Bingaman*, unpublished opinion per curiam of the Court of Appeals, Docket No. 329976 (August 24, 2017). **Exhibit 10**. The plaintiffs in *Shears* challenged the municipal defendants' decisions to increase water and sewer rates and to increase a readiness-to-serve charge. The plaintiffs' complaint included constitutional due process and other claims including, the plaintiffs' argued, unjust enrichment. The defendants argued that governmental immunity barred all of the plaintiff's claims. *Id*. at *3. With respect to the unjust enrichment theory, the circuit court disagreed, stating that "[b]ecause a claim of unjust enrichment is an equitable claim that sounds in contract, not in tort, Defendants are not entitled to immunity from these claims under the GTLA." *Id*. On appeal, a panel of the Court of Appeals reversed. *Id*. at *4. Following *Bradley's* directive to examine "the nature of the liability rather than type of action pleaded," the *Shears* Court determined that "it is quite apparent, at least in our view, that plaintiffs' claims constitute constitutional or tort claims based on alleged violations of various ordinance provisions."

Id. Accordingly, the *Shears* Court held that governmental immunity applied to the plaintiffs' unjust enrichment theory.

Absent this Court's review, confusion will continue to permeate Michigan' trial and appellate courts. Governmental defendants will have no way of knowing whether plaintiffs will be able to proceed with their tort claims through crafty labeling, since some panels, like the one in *Shears*, will correctly look to the nature of the liability to determine whether it sounds in tort, while others, like the panel in this case, will refuse to look beyond the label affixed to the complaint. This, in turn, will create a host of problems for governmental defendants and have a trickle-down effect on the public. This Court should peremptorily reverse or grant leave to reaffirm the strong protections of governmental immunity and that even non-traditional tort claims, like unjust enrichment, are barred by the Governmental Tort Liability Act.

RELIEF

WHEREFORE, Defendant-Appellant Genesee County respectfully requests this Court peremptorily reverse the August 22, 2017 opinion of the Court of Appeals and grant summary disposition to Genesee County. Failing that, Defendant-Appellant requests this Court grant this application for leave to appeal, and after full briefing and argument, issue a decision reversing the Court of Appeals' opinion and remanding the case to the Genesee County Circuit Court for entry of an order granting summary disposition in the County's favor, and enter all other relief which is proper in law and equity.

Respectfully submitted,

PLUNKETT COONEY

By: /s/Mary Massaron

MARY MASSARON (P43885)
HILARY A. BALLENTINE (P69979)
H. WILLIAM REISING (P19343)
Attorneys for Defendant-Appellant
Genesee County
38505 Woodward Ave., Suite 100
Bloomfield Hills, MI 48304
(313) 983-4801
mmassaron@plunkettcooney.com

Dated: October 3, 2017

STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

GENESEE COUNTY DRAIN COMMISSIONER, JEFFREY WRIGHT,

Plaintiff-Appellee,

and

CHARTER TWP OF FENTON, DENNIS BOW, KARYN MILLER, BONNIE MATHIS, PAULA ZELENKO, MARILYN HOFFMAN, LARRY GREEN, JAKE LaFURGEY, RAY FOUST, DAVID GUIGEAR, ROBERT M. PALMER, RICK CARUSO, WILLIAM W. KOVL, and MAXINE ORR, VILLAGE OF GOODRICH, VILLAGE OF GAINES, VILLAGE OF LENNON, CHARTER TOWNSHIP OF MUNDY, TOWNSHIP OF ARGENTINE, CHARTER TOWNSHIP OF FLINT, CHARTER TOWNSHIP OF MT. MORRIS, TOWNSHIP OF GAINES, AND CITY OF FLUSHING,

Plaintiffs,

v

GENESEE COUNTY, a Michigan municipal corporation

Defendant-Appellant

and

THE GENESEE COUNTY BOARD OF COMMISSIONERS,

Defendant. /

MSC No.

MCOA No. 331023

LC No. 11-97012-CK
(Genesee County Circuit Court)

PROOF OF SERVICE

Marjorie E. Renaud, states that she is an employee of the law firm of Plunkett Cooney, and that on October 3, 2017, she caused to be served a copy of a Notice of Filing Application, Application for Leave to Appeal, and Proof of Service as follows:

SCOTT R. FRAIM (P35699)
BRANDON S. FRAIM (P76350)
HENNEKE FRAIM & DAWES PC
Attorneys for Plaintiff-Appellee
2377 S. Linden Road, Suite B
Flint, MI 48532
810-733-2050
810-733-0183 - Fax
sfraim@hmfdlaw.com
bfraim@hmfdlaw.com
bbrown@hmfdlaw.com

Counsel was served via TrueFiling

The undersigned further states that the *Notice of Filing Application* was served upon the following courts:

Michigan Court of Appeals — **The Court was e-served via TrueFiling**

Clerk of the Court
Genesee County Circuit Court — **The Trial Court was served via U.S. mail, with postage prepaid**

/s/Marjorie E. Renaud

Open.06002.60091.18968205-1

STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

GENESEE COUNTY DRAIN COMMISSIONER, JEFFREY WRIGHT,

Plaintiff-Appellee,

and

CHARTER TWP OF FENTON, DENNIS BOW, KARYN MILLER, BONNIE MATHIS, PAULA ZELENKO, MARILYN HOFFMAN, LARRY GREEN, JAKE LaFURGEY, RAY FOUST, DAVID GUIGEAR, ROBERT M. PALMER, RICK CARUSO, WILLIAM W. KOVL, and MAXINE ORR, VILLAGE OF GOODRICH, VILLAGE OF GAINES, VILLAGE OF LENNON, CHARTER TOWNSHIP OF MUNDY, TOWNSHIP OF ARGENTINE, CHARTER TOWNSHIP OF FLINT, CHARTER TOWNSHIP OF MT. MORRIS, TOWNSHIP OF GAINES, AND CITY OF FLUSHING,

Plaintiffs,

v

GENESEE COUNTY, a Michigan municipal corporation

Defendant-Appellant

and

THE GENESEE COUNTY BOARD OF COMMISSIONERS,

Defendant. /

MSC No.

MCOA No. 331023

LC No. 11-97012-CK
(Genesee County Circuit Court)

EXHIBITS TO APPLICATION FOR LEAVE TO APPEAL

EXHIBIT	**DESCRIPTION**
1	August 22, 2017 decision of the Court of Appeals
2	Second Amended Complaint
3	Motion for Leave to File Second Amended Complaint and Brief in Support (without exhibits)
4	County's Response to Motion to Amend

5	10/5/15 Order Granting Plaintiff Leave to File its Second Amended Complaint
6	County's Motion for Partial Summary Disposition
7	Commissioner's Response to Motion for Partial Summary Disposition
8	County's Reply Brief in Support of Motion for Summary Disposition
9	12/28/15 Order Denying Defendant's Motion for Partial Summary Disposition
10	*Shears v Bingaman*, unpublished opinion per curiam of the Court of Appeals, Docket No. 329976 (August 24, 2017)

Open.06002.60091.19136779-1

EXHIBIT 1

STATE OF MICHIGAN

COURT OF APPEALS

GENESEE COUNTY DRAIN COMMISSIONER and JEFFREY WRIGHT

Plaintiffs-Appellees,

and

CHARTER TOWNSHIP OF FENTON, DENNIS BOW, KARYN MILLER, BONNIE MATHIS, PAULA ZELENKO, MARILYN HOFFMAN, LARRY GREEN, JAKE LAFURGEY, RAY FOUST, DAVID GUIGEAR, ROBERT M. PALMER, RICK CARUSO, WILLIAM W. KOVL, MAXINE ORR, VILLAGE OF GOODRICH, VILLAGE OF GAINES, VILLAGE OF LENNON, CHARTER TOWNSHIP OF MUNDY, TOWNSHIP OF ARGENTINE, CHARTER TOWNSHIP OF FLINT, CHARTER TOWNSHIP OF MT. MORRIS, TOWNSHIP OF GAINES, and CITY OF FLUSHING,

Plaintiffs,

v

GENESEE COUNTY,

Defendant-Appellant,

and

GENESEE COUNTY BOARD OF COMMISSIONERS,

Defendant.

FOR PUBLICATION
August 22, 2017
9:10 a.m.

No. 331023
Genesee Circuit Court
LC No. 11-097012-CK

Before: SAWYER, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

We are asked in this appeal to determine whether a claim based upon a theory of unjust enrichment is barred by the doctrine of governmental immunity. We conclude that it is not.

This is the second time that this case is before us. See *Genesee Co Drain Comm'r v Genesee Co*, 309 Mich App 317; 869 NW2d 635 (2015). That opinion fully sets out the relevant facts of this case. Briefly, plaintiff Wright is the Genesee County Drain Commissioner and, along with the other plaintiffs, participated in a county health plan through Blue Cross and Blue Shield. Premiums were paid both by the county and the participants. Those premiums were set annually and were based upon an estimate of the amount that the claims would be for the upcoming year along with the administrative costs of the plan. Unbeknownst to plaintiffs, at the end of each year, Blue Cross would refund to the county the amount by which the premiums exceeded the amount necessary to pay the claims and costs. The instant suit was instituted to recover the portion of the refunds that represented the participants' share of the premiums paid.

In the original appeal, we held that plaintiffs' claims alleging intentional torts were barred by governmental immunity and that plaintiffs could not recover under a breach of contract claim for any damages that accrued before October 24, 2005 (6 years before the filing of this action). Thereafter, following remand, in addition to the continuation of plaintiffs' breach of contract claim, the trial court permitted the complaint to be amended to add an unjust enrichment claim. Defendant again moved for partial summary disposition, arguing that governmental immunity barred the unjust enrichment claim and that plaintiffs failed to state a claim for unjust enrichment. The trial court concluded that governmental immunity did not bar the unjust enrichment claim. The trial court allowed the matter to continue, though without explicitly ruling on whether plaintiffs properly stated a claim for unjust enrichment. Defendant now appeals.

We review de novo both the grant of summary disposition under MCR 2.116(C)(7) and questions of statutory interpretation. *In re Bradley Estate*, 494 Mich 367, 376-377; 835 NW2d 367 (2013). And we look first to *Bradley* for assistance in answering the question whether a claim based upon unjust enrichment constitutes one for "tort liability" that comes under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. *Bradley* does not directly answer this question as it involved a claim based upon civil contempt rather than unjust enrichment. But it does provide guidance in determining whether a particular claim falls under the GTLA.

Plaintiffs' claim based upon unjust enrichment is barred only if unjust enrichment imposes "tort liability."[1] The Court in *In re Bradley Estate*, 494 Mich at 384-385, summarized the analyses as follows:

[1] It is not argued that the claim based upon a breach of contract theory is barred by the GTLA. Nor do plaintiffs argue that any of the exceptions to the GTLA for tort liability apply here to the unjust enrichment claim.

> Given the foregoing, it is clear that our common law has defined "tort" to be a civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of compensatory damages. Accordingly, because the word "tort" has "acquired a peculiar and appropriate meaning" in our common law, and because the Legislature is presumed to be aware of the common law when enacting legislation, we conclude that the term "tort" as used in MCL 691.1407(1) is a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages.
>
> Our analysis, however, requires more. MCL 691.1407(1) refers not merely to a "tort," nor to a "tort claim" nor to a "tort action," but to "tort *liability*." The term "tort," therefore, describes the type of liability from which a governmental agency is immune. As commonly understood, the word "liability," refers to liableness, i.e., "the state or quality of being liable." To be "liable" means to be "legally responsible[.]" Construing the term "liability" along with the term "tort," it becomes apparent that the Legislature intended "tort liability" to encompass legal responsibility arising from a tort. We therefore hold that "tort liability" as used in MCL 691.1407(1) means all legal responsibility arising from a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages. [Footnotes and citations omitted.]

Unjust enrichment is an equitable doctrine. *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d 896 (2006). Under this doctrine, "the law will *imply a contract* to prevent unjust enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense." *Id.* at 195 (emphasis added). But, "a *contract will be implied* only if there is no express contract covering the same subject matter." *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993) (emphasis added). In other words, "the law *imposes a contract* to prevent unjust enrichment, which occurs when one party receives a benefit from another the retention of which would be inequitable." *Martin v East Lansing School Dist*, 193 Mich App 166, 177; 483 NW2d 656 (1992) (emphasis added). See also *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 546; 473 NW2d 652 (1991). Further, our Supreme Court specifically has held that a breach of implied contract action is not barred by the GTLA. *In re Bradley Estate*, 494 Mich at 386.

We conclude that a claim under the equitable doctrine of unjust enrichment ultimately involves contract liability, not tort liability. It merely involves a situation in which the contract is an implied one imposed by the court in the interests of equity rather than an express contract entered into by the parties. Accordingly, the claim is not barred by the GTLA.

Defendant also argues that plaintiffs have failed to state a claim under unjust enrichment. It does not appear that the trial court addressed this issue. Accordingly, we decline to do so on appeal. Defendant is, however, free on remand to renew its motion for summary disposition under MCR 2.116A(C)(8) based upon a failure to state a claim for unjust enrichment so that the trial court may address it in the first instance.

Affirmed and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiffs may tax costs.

/s/ David H. Sawyer
/s/ Deborah A. Servitto
/s/ Michael J. Riordan

EXHIBIT 2

STATE OF MICHIGAN
IN THE 7TH CIRCUIT COURT
COUNTY OF GENESEE

GENESEE COUNTY DRAIN COMMISSIONER, JEFFREY WRIGHT, Plaintiff, v GENESEE COUNTY, a Michigan municipal corporation, Defendant.	Case No. 11-97012-CK Hon. Geoffrey L. Neithercut **PLAINTIFF'S SECOND AMENDED COMPLAINT**

HENNEKE, FRAIM & DAWES, P.C. By: Scott R. Fraim (P35669) By: Brandon S. Fraim (P76350) Attorneys for Plaintiffs 2377 S. Linden Rd., Ste. B Flint, MI 48532 (810) 733-2050	PLUNKETT COONEY By: H. William Reising (P19343) Attorneys for Defendant 111 E. Court Street, Suite 1B Flint, MI 48502 (810) 342-7001

PLAINTIFF'S SECOND AMENDED COMPLAINT

There is no other pending or resolved civil action arising out of the same transaction or occurrences as alleged in the Complaint.

Scott R. Fraim (P35669)

Plaintiff, Genesee County Drain Commissioner, for its Second Amended Complaint against Defendant, Genesee County, states:

GENERAL ALLEGATIONS

1. Plaintiff, the Genesee County Drain Commissioner, Jeffrey Wright, ("Genesee County Drain Commissioner"), is the duly elected drain commissioner for Genesee County, Michigan.

2. Defendant, Genesee County ("Genesee County"), is a Michigan municipal corporation located in Genesee County, Michigan.
3. The amount in controversy in this matter exceeds $25,000.00.
4. The acts and violations described in this Complaint have been conceived, carried out, and made effective within Genesee County, Michigan by reason of Genesee County's conduct and actions performed within this county and therefore venue is proper with this Court.
5. The Genesee County Drain Commissioner in his capacity as the County Agency has established a water distribution system that provides water service to users in several cities, townships, and villages throughout Genesee County.
6. The Genesee County Drain Commissioner in his capacity as County Agency provides sanitary sewer services to users in several cities, townships, and villages throughout Genesee County.
7. At a date unknown to Plaintiffs, Genesee County, Genesee County Community Mental Health Agency ("Mental Health") and the Genesee County Drain Commissioner entered into an agreement to purchase as a group or cluster, health insurance coverage from Blue Cross/Blue Shield of Michigan ("Blue Cross") for the benefit of their respective employees. Genesee County, Mental Health, and the Genesee County Drain Commissioner are collectively referred to as the "Plan Group".
8. A purpose of the group or cluster was to create a larger pool of participating employees with the benefit of lowering overall premium cost for health insurance and for the more efficient administration of health insurance benefits for the Plan Group.
9. The Plan Group was identified by Blue Cross as Cluster 0300 (the "Blue Cross Plan").
10. The Blue Cross Plan arrangement continued in effect until approximately June 2008.

11. Employees of each member of the Plan Group participated in the Blue Cross Plan.

12. On information and belief, for all times that the Blue Cross Plan remained in effect, Blue Cross would determine the monthly and/or annual premium rate to be paid by the Plan Group which for the Genesee County Drain Commissioner, was determined by insurance ratings on its employees participating in the Blue Cross Plan.

13. The Genesee County Drain Commissioner was invoiced for the amount of premiums due for health insurance coverage provided by the Blue Cross Plan to its employees.

14. On information and belief, Genesee County and Mental Health were likewise separately invoiced for the amount of premiums due for health insurance coverage provided by the Blue Cross Plan for their respective employees.

15. Each member of the Plan Group had the obligation to pay premiums assessed for their employees that participated in the Blue Cross Plan.

16. Each member of the Plan Group paid Blue Cross the premiums invoiced for their employees that participated in the Blue Cross Plan.

17. Blue Cross would annually audit the claims experience of the Blue Cross Plan and would then establish premiums for health insurance coverage for the following year.

18. Genesee County acted as a fiduciary of the Blue Cross Plan and on information and belief acted as the plan administrator.

19. Blue Cross provided a settlement accounting to Genesee County for each year of the Blue Cross Plan.

20. For all plan years from 2001 through 2008, the Blue Cross annual settlement accounting revealed that premiums paid for the Blue Cross Plan substantially exceeded claims paid, administration expenses, and necessary reserves for such plan year. It is currently unknown

by Plaintiffs if settlement accounting in years prior to 2001 likewise revealed substantial surpluses.

21. Unbeknown to the Genesee County Drain Commissioner, Blue Cross gave Genesee County the option of whether to leave the surplus in the Blue Cross Plan for the next plan year so as to reduce premiums chargeable for the next plan year or to receive a refund of the surplus.

22. Each year of the Blue Cross Plan, Genesee County opted to receive a refund of the surplus from the plan.

23. If the surplus had been left within the Blue Cross Plan, the premium charged to each member of the Plan Group would have been reduced the following plan year.

24. Because of Genesee County's decision to take a distribution of the surplus each year, the premiums charged to the Genesee County Drain Commissioner for the following plan year were higher than what they would have been absent a refund of the surplus.

25. Over the life of the Blue Cross Plan, Blue Cross paid Genesee County millions of dollars in refunds of surplus premiums.

26. At the direction of Genesee County, Blue Cross would deliver a refund check to Genesee County following the end of each plan year with such refund checks being made payable solely to Genesee County.

27. On information and belief, Genesee County deposited the refund checks from the Blue Cross Plan into its general fund.

28. Genesee County never communicated to the Genesee County Drain Commissioner that it was receiving these substantial checks for refunds from the Blue Cross Plan.

29. The Genesee County Drain Commissioner only discovered that Genesee County was withdrawing refunds from the Blue Cross Plan when it had a review performed of its health care expenditures.

30. The Genesee County Drain Commissioner, for the life of the Blue Cross Plan, paid its proportionate share of premiums assessed for health care insurance.

31. As a member of the Plan Group, the Genesee County Drain Commissioner was entitled to a portion of the refund based upon its participation in the Blue Cross Plan.

32. Payments made for premiums due the Blue Cross Plan by the Genesee County Drain Commissioner were from service fees received from water and/or sewer users.

33. When the Blue Cross Plan was terminated in approximately June 2008, there also remained a surplus in the plan. Upon information and belief, Genesee County either withdrew this final surplus as an additional refund distribution or applied the refund as a credit to the replacement health care plan adopted by Genesee County.

34. The Genesee County Drain Commissioner has made numerous demands to Genesee County for repayment of the Drain Commissioner's proportionate share of refunds and surpluses arising under the Blue Cross Plan.

35. Genesee County has refused to make payment to the Genesee County Drain Commissioner.

COUNT I - BREACH OF CONTRACT

36. Plaintiffs incorporate paragraphs 1 through 35 by reference.

37. The Genesee County Drain Commissioner, Mental Health, and Genesee County, as the three members of the Plan Group were each responsible to pay premiums charged to each of them respectively for health care insurance coverage provided their respective employees participating in the Blue Cross Plan.

38. Because each of the members of the Plan Group paid premiums based upon their respective employees that participated in the Blue Cross Plan, all refunds received by Genesee County would belong jointly to the Plan Group and not solely to Genesee County.

39. Failure to pay over to the Genesee County Drain Commissioner his proportionate share of all refunds constitutes a breach of contract.

40. The entire amount due and owing to the Genesee County Drain Commissioner from Genesee County is uncertain; but the amount due and owing which is currently known by the Drain Commissioner is in excess of $2,700,000.

41. Genesee County had a duty to repay the Genesee County Drain Commission his proportionate share of all refunds from the Blue Cross Plan and has failed to do so.

WHEREFORE, the Genesee County Drain Commissioner requests that this Court enter judgment against Defendants in an amount in excess of $2,700,000 plus interest, costs, and attorney's fees.

COUNT II – UNJUST ENRICHMENT

42. Plaintiff incorporates paragraphs 1 through 41 by reference.

43. Genesee County wrongfully and unjustly retained a portion of the refunds under the Blue Cross Plan that belong to Genesee County Drain Commissioner.

44. Genesee County is not entitled to retain Genesee County Drain Commissioner's portion of the refunds issued under the Blue Cross Plan.

45. Due to Genesee County's wrongful retention of Genesee County Drain Commissioner's portion of the refunds, Genesee County has been unjustly enriched.

46. It is inequitable for Genesee County to retain Genesee County Drain Commissioner's portion of the refunds issued under the Blue Cross Plan.

47. Genesee County Drain Commissioner has been harmed by Genesee County's inequitable retention of its refunds.

WHEREFORE, the Genesee County Drain Commissioner requests that this Court enter judgment against Defendants in an amount in excess of $2,700,000 plus interest, costs, and attorney's fees.

Respectfully submitted,
HENNEKE, FRAIM & DAWES, P.C.

Date: 10-6-15

By: Scott R. Fraim (P35669)
By: Brandon S. Fraim (P76350)
Attorneys for Plaintiff
2377 S Linden Rd, Suite B
Flint, MI 48532
(810) 733-2050

JURY DEMAND

Plaintiff, by and through their attorneys, Henneke, Fraim & Dawes, P.C., hereby demands a trial by jury of the above-entitled cause.

Respectfully submitted,
HENNEKE, FRAIM & DAWES, P.C.

Date: 10.6.15

By: Scott R. Fraim (P35669)
By: Brandon S. Fraim (P76350)
Attorneys for Plaintiff
2377 S Linden Rd, Suite B
Flint, MI 48532
(810) 733-2050

STATE OF MICHIGAN
IN THE 7TH CIRCUIT COURT
COUNTY OF GENESEE

GENESEE COUNTY DRAIN COMMISSIONER, JEFFREY WRIGHT, Plaintiff, v GENESEE COUNTY, a Michigan municipal corporation, Defendant.	Case No. 11-97012-CK Hon. Geoffrey L. Neithercut

HENNEKE, FRAIM & DAWES, P.C. By: Scott R. Fraim (P35669) By: Brandon S. Fraim (P76350) Attorneys for Plaintiffs 2377 S. Linden Rd., Ste. B Flint, MI 48532 (810) 733-2050	PLUNKETT COONEY By: H. William Reising (P19343) Attorneys for Defendant 111 E. Court Street, Suite 1B Flint, MI 48502 (810) 342-7001

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS
COUNTY OF GENESEE)

The undersigned being first duly sworn deposes and says that she mailed a copy of the following documents in the manner specified:

DOCUMENTS SERVED:	Plaintiff's Second Amended Complaint and Proof of Service
DATE SERVED:	October 7, 2015
MANNER SERVED:	US First Class Mail
PERSONS SERVED:	Plunkett Cooney H. William Reising, Esq. Rhonda R. Stowers, Esq. 111 E. Court Street, Suite 1B Flint, MI 48502

Bernadette Brown

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HENNEKE, FRAIM & DAWES

hfdlaw.com

October 5, 2015

Plunkett Cooney
H. William Reising, Esq.
111 E. Court Street, Suite 1B
Flint, MI 48502

RE: Genesee County Drain Commissioner v. Genesee County
Genesee County Circuit Court Case No: 2011-97102-CK

Dear Mr. Reising:

Enclosed please find a copy of Plaintiff's Second Amended Complaint and Proof of Service re same.

Very truly yours,

Bernadette Brown
Legal Assistant to Scott R. Fraim,
Brandon S. Fraim, and Anne S. Werling

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EXHIBIT 3

STATE OF MICHIGAN
IN THE 7TH CIRCUIT COURT
COUNTY OF GENESEE

GENESEE COUNTY DRAIN COMMISSIONER, JEFFREY WRIGHT, Plaintiff, v GENESEE COUNTY, a Michigan municipal corporation, Defendant.	Case No. 11-97012-CK Hon. Geoffrey L. Neithercut **PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT**

HENNEKE, FRAIM & DAWES, P.C. By: Scott R. Fraim (P35669) By: Brandon S. Fraim (P76350) Attorneys for Plaintiffs 2377 S. Linden Rd., Ste. B Flint, MI 48532 (810) 733-2050	PLUNKETT COONEY By: H. William Reising (P19343) Attorneys for Defendant 111 E. Court Street, Suite 1B Flint, MI 48502 (810) 342-7001

PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Plaintiff Genesee County Drain Commissioner, Jeffrey Wright, ("Plaintiff"), by and through its attorneys Henneke. Fraim & Dawes, P.C., submits its Motion for Leave to File its Second Amended Complaint. As its motion, Plaintiff states:

1. Plaintiff seeks leave from this Court to amend its First Amended Complaint and file its Second Amended Complaint in order to add a cause of action against Defendant for unjust enrichment.
2. On October 24. 2011. Plaintiff filed this lawsuit against Genesee County, and others, ("Defendant"). alleging various causes of action relating to a group health care planning, including breach of contract and certain tort claims, including fraud and misappropriation of funds.

3. Shortly after litigation commenced, Plaintiff moved to amend its original complaint to solely add interested parties to the lawsuit as additional plaintiffs, which this Court granted.
4. On July 23, 2012, after only preliminary discovery had been conducted in this case, Defendant filed its Motion for Partial Summary Disposition, which this Court partially granted and partially denied.
5. This Court's decision was appealed by Defendant to the Michigan Court of Appeals, which stayed this Court's proceedings for over two years.
6. On June 12, 2015, after the Michigan Court of Appeals affirmed in part and reversed in part this Court's prior decision, this Court entered an order reopening proceedings and revised scheduling order dates, including the following dates:
    a. Discovery cut-off is December 21, 2015;
    b. Motion cut-off is February 22, 2016;
    c. Trial is July 12, 2016.
7. Pursuant to MCR 2.118(A)(2), Plaintiff may amend a pleading only by leave of this Court; however, motions to amend a complaint are accorded great liberality and leave shall be freely given when justice so requires.
8. As shown in the accompanying brief in support, there exists adequate grounds and basis for Plaintiff's proposed amendment, which could not have been added earlier due to the pending appeal and stay of proceedings.
9. Litigation of this case was excusably delayed due to the extremely long pendency of this case in the Michigan Court of Appeals and through no fault of either party.
10. There is no inexcusable delay in requesting the leave to amend, nor is there prejudice to Defendant as discovery is still open and the trial date is set far into the future. Furthermore,

Plaintiff is not requesting an extension of the discovery or motion periods or the trial date should this motion be granted.

11. The proposed claim of unjust enrichment is similar to Plaintiff's existing breach of contract claim and would be pled in the alternative to Plaintiff's breach of contract claim.

12. Moreover, both contain the same statute of limitations period of six years under MCL 600.5813. Thus, this Court's prior decision limiting the time period of recovery for Plaintiff's breach of contract claim will apply to the new unjust enrichment claim as well.

13. Defendant denies the existence of an express contract between the parties, but if it is shown that that Defendant was unjustly or inequitably enriched at Plaintiff's expense, the law will imply a contract to prevent the unjust enrichment.

14. In addition, as shown in the accompanying brief in support, Plaintiff's proposed claim for unjust enrichment against Defendant is not barred by the Michigan Court of Appeals decision in this case.

15. As shown in the accompanying brief in support, justice requires that leave be granted.

16. Plaintiff's proposed Second Amended Complaint is attached as **Exhibit A.**

THEREFORE, and as set more fully in Plaintiff's accompanying Brief in Support, Plaintiff respectfully requests that this Court grant it leave to file the attached proposed Second Amended Complaint.

Respectfully submitted,
HENNEKE, FRAIM & DAWES, P.C.

Date: 9.8.15

By: Scott R. Fraim (P35669)
By: Brandon S. Fraim (P76350)
Attorneys for Plaintiff

STATE OF MICHIGAN
IN THE 7TH CIRCUIT COURT
COUNTY OF GENESEE

GENESEE COUNTY DRAIN COMMISSIONER, JEFFREY WRIGHT, Plaintiff, v GENESEE COUNTY, a Michigan municipal corporation, Defendant.	Case No. 11-97012-CK Hon. Geoffrey L. Neithercut

HENNEKE, FRAIM & DAWES, P.C. By: Scott R. Fraim (P35669) By: Brandon S. Fraim (P76350) Attorneys for Plaintiffs 2377 S. Linden Rd., Ste. B Flint, MI 48532 (810) 733-2050	PLUNKETT COONEY By: H. William Reising (P19343) Attorneys for Defendant 111 E. Court Street, Suite 1B Flint, MI 48502 (810) 342-7001

PLAINTIFF'S BRIEF IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Plaintiff Genesee County Drain Commissioner, Jeffrey Wright, ("Plaintiff"), by and through its attorneys Henneke, Fraim & Dawes, P.C., submits its Brief in Support of its Motion for Leave to File its Second Amended Complaint. As its Brief in Support, Plaintiff states:

INTRODUCTION

Plaintiff seeks to add a cause of action against Defendant for unjust enrichment regarding the parties' prior group health care plan and refunds paid under it.

PROCEEDINGS BACKGROUND

On October 24, 2011, Plaintiff filed this lawsuit against Genesee County, and others, ("Defendant"), alleging various causes of action relating to a group health care planning, including

breach of contract, fraud, and misappropriation of funds. Shortly after litigation commenced, Plaintiff amended its original complaint solely to add additional plaintiffs.

On July 23, 2012, after only preliminary discovery had been conducted in this case, Defendant filed its Motion for Partial Summary Disposition, which this Court partially granted and partially denied. This Court's decision was appealed by Defendant to the Michigan Court of Appeals and answered by Plaintiff.

During the pendency of said appeal, a stay was placed on this Court's proceedings in this case. After pending in the Michigan Court of Appeals for over two years, on March 3, 2015, the Michigan Court of Appeals issued its published decision affirming in part and reversing in part this Court's decision on Defendant's Motion for Partial Summary Disposition. Specifically, the Michigan Court of Appeals ordered that Plaintiff's intentional tort claims were precluded due to Defendant's governmental immunity. Plaintiff's claim for breach of contract against Defendant still survives in this action. On June 12, 2015, this Court entered an order reopening proceedings and revised scheduling order dates, including the following dates: Discovery cut-off is December 21, 2015; Motion cut-off is February 22, 2016; Trial is July 12, 2016.

LAW & ARGUMENT

Pursuant to MCR 2.118(A)(2), Plaintiff may amend its complaint only be leave of this Court. However, motions to amend a complaint are accorded great liberality and leave shall be freely given when justice so requires. MCR 2.118(A)(2). Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party, or where amendment would be futile. *Miller v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462, 463 (2007). The rules pertaining to the amendment of pleadings are

designed to facilitate amendment except when prejudice to the opposing party would result; **amendment is generally a matter of right rather than grace.** *PT Today, Inc v Commr of Office of Fin & Ins Services*, 270 Mich App 110, 143; 715 NW2d 398, 419 (2006)(emphasis added).

There exists no particularized reason for denying Plaintiff's Motion for Leave to File its Second Amended Complaint. Plaintiff has not failed to cure deficiencies nor is Plaintiff submitting this motion in bad faith. The only delay in the proceedings in this case were due to the extremely long pendency in the Michigan Court of Appeals, which was not the fault of either party or this Court. Furthermore, there would be no prejudice to Defendant as discovery still remains open for a substantial period of time and trial is set far into the future. In fact, the causes of action of unjust enrichment and breach of contract are similar and do not require specialized or complicated discovery. Moreover, the six-year statute of limitations period under MCL 600.5813 applies to the new proposed claim of unjust enrichment; thus, this Court's prior decision to limit recovery under Plaintiff's existing breach of contract claim to within the six-year statute of limitations period would also apply to the new unjust enrichment claim.

Moreover, Plaintiff's proposed amendment is not futile. Plaintiff only seeks leave to add one cause of action against Defendant – unjust enrichment. The theory underlying quantum meruit recovery or unjust enrichment is that the law will imply a contract in order to prevent unjust enrichment when one party inequitably receives and retains a benefit from another. *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 194; 729 NW2d 898, 903 (2006). It is undisputed that during the parties' prior group health care plan, Plaintiff and Defendant each paid their own respective insurance premiums for their own employees, which was estimated at the beginning of the policy period. However, at the end of each policy period, Blue Cross Blue Shield of Michigan settled the actual group health care plan figures, including refund amounts for overpayment of

premiums by the group participants. Defendant, without notification to Plaintiff or any other participant in the group health care plan, retained the entire group's refund each year as a cash payment, which was deposited into Defendant's own account. Defendant denies the existence of any express contract requiring it to notify other participants or share the group's refund, despite all participants paying for their own premiums from their own separate funds for coverage of their own separate employees. If no express contract is found to exist and if it is shown that that Defendant was unjustly or inequitably enriched at Plaintiff's expense, the law will imply a contract to prevent the unjust enrichment. *Karaus v Bank of New York Mellon*, 300 Mich App 9, 23; 831 NW2d 897, 905 (2012).

A claim of unjust enrichment requires the complaining party to establish (1) the receipt of a benefit by the other party from the complaining party and (2) an inequity resulting to the complaining party because of the retention of the benefit by the other party. *Id.* Defendant received cash refunds every year amounting to over $6.5 million that were attributable to over-payment of premiums by all of the group's participants, not just Defendant. Yet, Defendant admittedly failed to notify any other participant of the existence of the refunds and retained all refunds without distributing a proportionate share of the refunds to each plan participant whose overpayment of their own premiums created such refunds. If the refunds were properly allocated between the group participants according to their premium payments, the participants, including Plaintiff, would have received millions in cash or rate credits for their future premiums. Defendant was unjustly benefited by wrongfully retaining Plaintiff's portion of the group health care plan's refunds, resulting in a substantial loss of benefit for Plaintiff.

Lastly, the Michigan Court of Appeals decision to preclude certain intentional tort claims against Defendant in this case due to governmental immunity does not bar Plaintiff's proposed

amendment. Governmental immunity under MCL 691.1407, which was previously asserted by Defendant, only grants immunity from tort liability. This is evidenced by Plaintiff's breach of contract claim surviving Defendant's assertion of immunity. Plaintiff's claim for unjust enrichment, otherwise known as breach of implied contract, does not sound in tort but rather in contract and Defendant's governmental immunity does not bar recovery under it. *Rocco v Michigan Dept of Mental Health*, 114 Mich App 792, 800; 319 NW2d 674, 678 (1982).

CONCLUSION

As shown, Plaintiff's motion is to be accorded great liberality and granted freely unless justice requires otherwise. There exist no particularized reasons for denying Plaintiff's motion and Defendant will not be prejudiced by it. Therefore, Plaintiff respectfully requests that this Court grant its Motion for Leave to File its Second Amended Complaint.

Respectfully submitted,
HENNEKE, FRAIM & DAWES, P.C.

Date: 9-8-15

By: Scott R. Fraim (P35669)
By: Brandon S. Fraim (P76350)
Attorneys for Plaintiff

EXHIBIT 4

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

GENESEE COUNTY DRAIN COMMISSIONER, JEFFREY WRIGHT,

Plaintiff,

-vs-

GENESEE COUNTY, a Michigan municipal corporation,

Defendant.

Case no. 11-97012 CK
Hon. Geoffrey L. Neithercut

HENNEKE, MCKONE, FRAIM & DAWES PC
Scott R. Fraim P35669
Charles R. McCone P24260
Attorneys for Plaintiff
2377 S. Linden Road, Suite B
Flint, MI 48532
810-733-2050

PLUNKETT COONEY
H. William Reising P19343
Attorney for Defendant
111 E. Court Street, Suite 1B
Flint, MI 48502
810-342-7001

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

NOW COMES Defendant, by and through its attorneys, PLUNKETT COONEY, and for its Response to Plaintiff's Motion for Leave to File Second Amended Complaint, hereby states as follows:

Plaintiff is not entitled to the relief sought. Defendant relies upon the Court's docket and records as to the dates of filing of the various documents mentioned in Plaintiff's motion and the content of those documents. It is clear from this record that Plaintiff has unduly delayed filing the proposed claim of unjust enrichment, which is also futile and barred by governmental immunity. For these reasons, explained more fully in the brief in support of this response, Plaintiff's motion must be denied.

Dated: 9/29/16

Respectfully submitted,

PLUNKETT COONEY

H. William Reising (P19343)
Rhonda R. Stowers (P64083)
Attorneys for Defendants
(810) 342-7001

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

GENESEE COUNTY DRAIN COMMISSIONER, JEFFREY WRIGHT,

Plaintiff,

-vs-

GENESEE COUNTY, a Michigan municipal corporation,

Defendant.

Case no. 11-97012 CK
Hon. Geoffrey L. Neithercut

HENNEKE, MCKONE, FRAIM & DAWES PC
Scott R. Fraim P35669
Charles R. McCone P24260
Attorneys for Plaintiff
2377 S. Linden Road, Suite B
Flint, MI 48532
810-733-2050

PLUNKETT COONEY
H. William Reising P19343
Attorney for Defendant
111 E. Court Street, Suite 1B
Flint, MI 48502
810-342-7001

BRIEF IN SUPPORT OF DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

NOW COMES Defendant, by and through its attorneys, PLUNKETT COONEY, and hereby states the following in support of its Response to Plaintiff's Motion for Leave to File Second Amended Complaint.

Introduction

Plaintiff seeks to add a claim that could have been included in his original pleading, which was filed almost four years after Plaintiff was on notice that Defendant was receiving refunds pursuant to its contract with Blue Cross. This claim could also have been pled in Plaintiff's First Amended Complaint, which was filed after Defendant's Answer denying the existence of a contract between Plaintiff and Defendant. Plaintiff offers no excuse for his

repeated failure to timely assert the proposed unjust enrichment claim, which is futile as proposed and barred by governmental immunity. Leave to amend must accordingly be denied.

Plaintiff is not entitled to another amendment.

As explained in *Weymers v. Khera*, 454 Mich. 639, 658 (1997), there are multiple reasons that leave to amend should be denied even in light of the liberal amendment standard. Among those grounds are undue delay (as opposed to mere delay, which is not a sufficient basis for denying leave), failure to cure pleadings by prior permitted amendments, and futility. *Id.* All three of these grounds exist in this case and warrant the denial of Plaintiffs' motion.

Plaintiff has unduly delayed the filing of the proposed claim.

Undue delay is delay that is "excessive or unwarranted." Black's Law Dict., 7th Ed., p. 1529. Here, Plaintiff was aware as early as August of 2007 that the County was receiving a refund that he believed his department was entitled to a portion of. Plaintiff's first Complaint was not filed until almost three years later, on October 24, 2011. The alleged basis for the unjust enrichment claim Plaintiff now seeks to add was available and known to Plaintiff years before the original Complaint was filed. Plaintiff does not provide any explanation as to why this claim could not be included in his original pleading.

Plaintiff failed to earlier cure his deficient pleading.

Leave to file an amended complaint should also be denied where there has been "repeated failure to cure deficiencies by amendments previously allowed." *Weymers, supra,* at 658. At the very least, Plaintiff was put on notice with the filing of Defendant's Answer

on December 20, 2011 that Defendant denied the existence of a contract. (Def.'s Ans., filed with this Court, ¶ 56). Plaintiff moved to amend his pleading two months later, on February 21, 2012. That amendment could have included a claim for unjust enrichment, but Plaintiff failed to plead such a claim.

Plaintiff attributes his delay in seeking leave to Defendant's Motion for Partial Summary Disposition and the subsequent appeal, but Defendant's dispositive motion was not filed until July 23, 2012, giving Plaintiff more than **seven months** after Defendant's Answer to move to amend his pleadings based upon Defendant's denial of the existence of a contract. Plaintiff provides no explanation for failing to plead these claims initially, for failing to include them in his amended pleading, or for failing to seek leave to add an unjust enrichment claim in the seven months between the filing of Defendant's initial Answer and the filing of Defendant's dispositive motion. This merits a finding of undue delay and a denial of his motion.

Plaintiffs' proposed claims are futile.

Leave to amend is also appropriately denied in cases such as this where the moving party seeks to add a new claim or a new theory of recovery on the basis of the same set of facts late in the litigation. *Weymers, supra* at 659-60. The Michigan Supreme Court has stated, "We recognize that parties ought to be afforded great latitude in amending their pleading before trial, however, that interest must be weighed against the parties' and the public's interest in the speedy resolution of disputes." *Id.* It is not in the interests of the Court or the parties to undergo the time and expense of permitting the addition of claims that will fail as a matter of law.

Plaintiff's proposed claim of unjust enrichment is futile on its face, because the claim is barred by governmental immunity and also because Plaintiff cannot establish the elements of such a claim. This Court should not permit Plaintiffs to amend their Complaint to include futile, untimely claims. *Wormsbacher v. Seaver Title Co.*, 284 Mich. App. 1, 8-9 (2009) ("An amendment would be futile if it is legally insufficient on its face"). Plaintiff's motion must be denied due to the futility of Plaintiff's proposed additional claim.

The Governmental Tort Liability Act (GTLA) provides "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). A governmental function is any activity that is expressly or impliedly mandated or authorized by Constitution, statute, or other law. *Harrison v. Director of Dept. of Corrections*, 194 Mich. App. 446 (1992); *Eichhorn v. Lamphere Sch. Dist.*, 166 Mich. App. 527 (1988). This definition "is to be broadly applied and requires only that there be some constitutional, statutory or other legal basis for the activity in which the governmental agency was engaged." *Harris v. University of Mich. Bd. of Regents*, 219 Mich. App. 679, 684 (1996) (emphasis in original). As has already been established in this matter, the provision of health insurance benefits to public employees, and particularly to drain maintenance employees, constitutes a governmental function. *See* MCL 280.33(2) & (3). As these statutes provide the legal basis for the maintenance of drain employees by the County, the provision of health insurance to those employees, and the demand of reimbursement of same to the general fund, the County was engaged in a governmental function with respect to its interaction with the Drain Commissioner and the

health care premiums of its employees. Accordingly, Genesee County is immune from tort claims arising out of these interactions as a matter of law.

In 2013, the Michigan Supreme Court considered the meaning of the phrase "tort liability" for purposes of the GTLA, and held that the term "encompasses all legal responsibility for civil wrongs, other than a breach of contract, for which a remedy may be obtained in the form of compensatory damages." *In re Bradley Estate*, 494 Mich. 367 (2013). The case involved an order for civil contempt issued by the probate court to the Sheriff and his department after deputies failed to execute an order to take an individual into protective custody and the individual subsequently committed suicide. The probate court found that the petitioner was entitled to indemnification damages and the Sheriff appealed, arguing that it was immune under the GTLA because the petitioner was seeking to impose tort liability in the form of a civil contempt petition. The Michigan Supreme Court agreed with the Sheriff, finding that "'tort' as used in MCL 691.1407(1) is a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages." *Id.* at 385. Where an "action permits an award of damages to a private party as compensation for an injury caused by [a] noncontractual civil wrong, then the action, no matter how it is labeled, seeks to impose tort liability and the GLTA is applicable." *Id.* at 389.

Here, Plaintiff's proposed claim alleges that Genesee County engaged in wrongful conduct, harming Plaintiff, for which Plaintiff seeks compensatory damages. Plaintiff proposed claim contains the following allegations:

43. Genesee County wrongfully and unjustly retained a portion of the refunds under the Blue Cross Plan that belong to Genesee County Drain Commissioner.

44. Genesee County is not entitled to retain Genesee County Drain Commissioner's portion of the refunds issued under the Blue Cross Plan.

45. Due to Genesee County's wrongful retention of Genesee County Drain Commissioner's portion of the refunds, Genesee County has been unjustly enriched.

46. It is inequitable for Genesee County to retain Genesee County Drain Commissioner's portion of the refunds issued under the Blue Cross Plan.

47. Genesee County Drain Commissioner has been harmed by Genesee County's inequitable retention of its refunds.

In short, Plaintiff is seeking compensatory damages for a noncontractual civil wrong. His proposed cause of action is one of tort liability and is barred by the GTLA. *Id.* Plaintiff's claim is therefore futile on its face, and leave to amend must be denied.

Plaintiff's claim is also futile because it is not supported by the facts. In order to establish a claim of unjust enrichment, it must be shown that the Defendants received and retained a benefit from Plaintiff, for which Plaintiff was not compensated. *Belle Isle Grill Corp. v. City of Detroit*, 256 Mich. App. 463, 478 (2003) (citing *Barber v. SMH (US), Inc.*, 202 Mich. App. 366 (1993)). In this case, the Defendants did not receive a benefit from Plaintiffs. The refund it received was from Blue Cross, not Plaintiff. Further, Plaintiff was fully compensated for the funds that he expended for the health care plan. Plaintiff agreed to pay a certain amount for health care premiums for health benefits for his workers, and Plaintiff received those benefits. Plaintiff's unjust enrichment claim is therefore futile.

Conclusion

The claims Plaintiff seeks to add by requesting leave to file a Second Amended Complaint are untimely and futile. Plaintiff has offered no justification for the repeated failure to assert these claims in earlier pleadings, and the claims are clearly futile. Plaintiffs' motion should accordingly be denied.

Dated: 9/29/16

Respectfully submitted,

PLUNKETT COONEY

H. William Reising (P29343)
Rhonda R. Stowers (P64083)
Attorneys for Defendant
(810) 342-7001

Open.06002.13759.15989360-1

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses as disclosed on the pleadings on 9-30-, 2016

By: ☐ U.S. Mail ☐ FAX
☐ Hand Delivered ☐ Overnight Courier
☐ Certified Mail ☒ Other -email

Signature Carol Lee

EXHIBIT 5

STATE OF MICHIGAN
IN THE 7TH CIRCUIT COURT
COUNTY OF GENESEE

GENESEE COUNTY DRAIN COMMISSIONER, JEFFREY WRIGHT, Plaintiff, v GENESEE COUNTY, a Michigan municipal corporation, Defendant.	Case No. 11-97012-CK Hon. Geoffrey L. Neithercut A TRUE COPY Genesee County Clerk ORDER

HENNEKE, FRAIM & DAWES, P.C. By: Scott R. Fraim (P35669) By: Brandon S. Fraim (P76350) Attorneys for Plaintiffs 2377 S. Linden Rd., Ste. B Flint, MI 48532 (810) 733-2050	PLUNKETT COONEY By: H. William Reising (P19343) Attorneys for Defendant 111 E. Court Street, Suite 1B Flint, MI 48502 (810) 342-7001

ORDER GRANTING PLAINTIFF LEAVE TO FILE ITS SECOND AMENDED COMPLAINT

On this 5th day of October, 2015:

PRESENT: Hon. Geoffrey L. Neithercut
Circuit Court Judge

This matter having come before this Court upon the Plaintiff's Motion for Leave to File its Second Amended Complaint and the Court being otherwise advised in the premises:

IT IS HEREBY ORDERED: that Plaintiff's Motion for Leave to File its Second Amended Complaint is granted and Plaintiff shall have seven (7) days from the date of this order to file with this Court its Second Amended Complaint.

IT IS FURTHER ORDERED: that the limitation period applied to Plaintiff's breach of contract claim under this Court's Opinion and Order dated June 12, 2015, whereby only damages accruing after October 24, 2005 were recoverable, also applies to Plaintiff's unjust enrichment claim.

IT IS FURTHER ORDERED: that no revision has been made as to any of the scheduling dates set forth in this Court's Pretrial Summary and Order dated June 24, 2015.

This order does not dispose the last pending claim and does not close the case.

Geoffrey L Neithercut

Honorable Geoffrey L. Neithercut
Circuit Court Judge

Date: 10-5-15

EXHIBIT 6

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

GENESEE COUNTY DRAIN COMMISSIONER,
JEFFREY WRIGHT,

Plaintiff,

-vs-

GENESEE COUNTY,

Defendant.

Case no. 11-97012 CK
Hon. Geoffrey L. Neithercut

HENNEKE, MCKONE, FRAIM & DAWES PC
Scott R. Fraim P35669
Charles R. McCone P24260
Attorneys for Plaintiff
2377 S. Linden Road, Suite B
Flint, MI 48532
810-733-2050

PLUNKETT COONEY
H. William Reising P19343
Attorney for Defendant
111 E. Court Street, Suite 1B
Flint, MI 48502
810-342-7001

DEFENDANT'S MOTION FOR PARTIAL SUMMARY DISPOSITION

NOW COMES Defendant, by and through its attorneys, Plunkett Cooney, and for its Motion for Partial Summary Disposition, hereby states as follows:

1. Plaintiff has recently amended his pleadings in this matter to include a claim of unjust enrichment. Specifically, Plaintiff contends that "Genesee County wrongfully and unjustly retained a portion of the refunds under the Blue Cross Plan that belong to Genesee County Drain Commissioner." (Pl.'s 2d Am. Compl., filed with this Court, ¶ 43).

2. Plaintiff's claim of unjust enrichment constitutes a claim of tort liability and is therefore barred by governmental immunity and must be dismissed pursuant to MCL 691.1407(1).

3. Defendant is therefore entitled to summary disposition with respect to the above claim. MCR 2.116(C)(7).

4. Furthermore, Plaintiff cannot establish a claim of unjust enrichment because Defendant did not receive and retain a benefit to Plaintiff's detriment. MCR 2.116(C)(8).

WHEREFORE, Defendant prays that this Honorable Court GRANT its Motion for Partial Summary Disposition, dismissing Plaintiff's claim of unjust enrichment, together with such additional relief as this Court deems just and proper.

Respectfully submitted,

PLUNKETT COONEY

Dated: 10/22/16

H. William Reising (P19343)
Rhonda R. Stowers (P64083)
Attorneys for Defendants
(810) 342-7001

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on 10-26-2016

By: ☐ U.S. Mail ☐ FAX
☑ Hand Delivered ☐ Overnight Courier
☐ Certified Mail ☐ Other

Signature

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

GENESEE COUNTY DRAIN COMMISSIONER, JEFFREY WRIGHT,

Plaintiff,

-vs-

GENESEE COUNTY,

Defendant.

Case no. 11-97012 CK
Hon. Geoffrey L. Neithercut

HENNEKE, MCKONE, FRAIM & DAWES PC
Scott R. Fraim P35669
Charles R. McCone P24260
Attorneys for Plaintiff
2377 S. Linden Road, Suite B
Flint, MI 48532
810-733-2050

PLUNKETT COONEY
H. William Reising P19343
Attorney for Defendant
111 E. Court Street, Suite 1B
Flint, MI 48502
810-342-7001

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY DISPOSITION

NOW COMES Defendant, by and through its attorneys, Plunkett Cooney, and hereby states the following in support of its Motion for Partial Summary Disposition.

INTRODUCTION

Plaintiff has recently filed a Second Amended Complaint alleging two counts: breach of contract and unjust enrichment. Plaintiff's claim of unjust enrichment is barred by governmental immunity and otherwise fails as a matter of law. Defendant is therefore entitled to a dismissal of that claim.

STATEMENT OF FACTS

For the purposes of this Motion ONLY, Defendant will not dispute the facts as alleged by Plaintiff, which it would otherwise dispute. Given those facts, dismissal of Plaintiff's unjust enrichment claim is warranted as a matter of law.

According to Plaintiff, group health insurance coverage was purchased from Blue Cross/Blue Shield of Michigan for the benefit of County employees, to include the employees of the Genesee County Drain Commissioner. (Pl.'s 2d Am. Compl., filed with this Court, ¶ 7-10). Plaintiff asserts that this was a contractual agreement between Genesee County, the Genesee County Community Mental Health Agency and the Genesee County Drain Commissioner. (Pl.'s 2d Am. Compl., ¶ 7, 36-41). The Genesee County Drain Commissioner paid for the health insurance premiums of its employees so that they would be provided health insurance coverage. (Pl.'s 2d Am. Compl., ¶ 15-16).

At the end of each plan year, Blue Cross would provide an annual settlement accounting statement of premiums paid and plan expenses incurred. (Pl.'s 2d Am. Compl., ¶ 19). When premiums exceeded the expenses incurred, Blue Cross gave the option of a credit toward the next plan year or a refund. (Pl.'s 2d Am. Compl., ¶ 21). If the County opted for a refund, a refund check was issued to Genesee County and was deposited in its general fund. (Pl.'s 2d Am. Compl., ¶ 26-27).

Plaintiff filed this action claiming that the failure to provide a portion of this refund to the Genesee County Drain Commissioner constitutes a breach of contract between the County and the Commissioner. (Pl.'s 2d Am. Compl., ¶36-41). Plaintiff also claims that the County wrongfully and unjustly retained a portion of the refund's retention of the refund, constituting unjust enrichment. (Pl.'s 2d Am. Compl., ¶ 42-47).

MOTION STANDARDS

Summary disposition is mandated where the criteria set forth in the subsections of MCR 2.116(C) are met. Specifically, MCR 2.116(C)(7) allows summary disposition when the "claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action." (emphasis added).

"In deciding a motion made under MCR. 2.116(C)(7), a court should consider all affidavits, pleadings, and other documentary evidence submitted by the parties." *Holmes v. Michigan Capital Med. Ctr.*, 242 Mich. App. 703, 706 (2000). The court accepts all well-pleaded allegations as true and construes them in a light most favorable to the nonmoving party. *Spikes v Banks*, 231 Mich. App. 341 (1998). "To survive a motion for summary disposition, brought under MCR 2.116(C)(7), the plaintiff must allege facts warranting the application of an exception to governmental immunity." *Smith v. Kowalski*, 223 Mich. App. 610, 616 (1997).

A motion brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a complaint and requires the Court to determine whether or not an opposing party's pleadings allege a prima facie case. This court rule allows the court to grant summary disposition where "[t]he opposing party has failed to state a claim on which relief can be granted." MCR 2.116(C)(8). No findings of fact are made; instead, all well-pled facts are accepted as true. *Radtke v. Everett*, 442 Mich. 368, 373 (1993). Summary disposition under MCR 2.116(C)(8) is warranted where allegations fail to state a legal claim. *Id.* Summary

disposition must be granted under this rule when the claim is legally unenforceable and no factual development would justify recovery. *Simko v. Balke*, 448 Mich. 648, 654 (1985).

ANALYSIS

Plaintiff's claim of unjust enrichment is barred by governmental immunity and is otherwise unsustainable as a matter of law, even on the facts as alleged by Plaintiff. Defendant is therefore entitled to summary disposition.

Governmental immunity precludes Plaintiff's unjust enrichment claim.

Plaintiff is asserting two claims against Genesee County: a contract claim and a claim of unjust enrichment, which does not rely upon an alleged contract. This latter claim is barred by governmental immunity.

The Governmental Tort Liability Act (GTLA) provides "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). A governmental function is any activity that is expressly or impliedly mandated or authorized by Constitution, statute, or other law. Harrison v. Director of Dept. of Corrections, 194 Mich. App. 446 (1992); Eichhorn v. Lamphere Sch. Dist, 166 Mich. App. 527 (1988). This definition "is to be broadly applied and requires only that there be some constitutional, statutory or other legal basis for the activity in which the governmental agency was engaged." Harris v. University of Mich. Bd. of Regents, 219 Mich. App. 679, 684 (1996) (emphasis in original). As has already been established in this matter, the provision of health insurance benefits to public employees, and particularly to drain maintenance employees, by Genesee County is a governmental function. See MCL 280.33(2) & (3). As the County was engaged in a governmental function with respect to its interaction with the Drain Commissioner and the

health care premiums of its employees, it is immune from tort claims arising out of these interactions as a matter of law.

In 2013, the Michigan Supreme Court considered the meaning of the phrase "tort liability" for purposes of the GTLA, and held that the term "encompasses all legal responsibility for civil wrongs, other than a breach of contract, for which a remedy may be obtained in the form of compensatory damages." *In re Bradley Estate*, 494 Mich. 367 (2013). The case involved an order for civil contempt issued by the probate court to the Sheriff and his department after deputies failed to execute an order to take an individual into protective custody and the individual subsequently committed suicide. The probate court found that the petitioner was entitled to indemnification damages and the Sheriff appealed, arguing that it was immune under the GTLA because the petitioner was seeking to impose tort liability in the form of a civil contempt petition. The Michigan Supreme Court agreed with the Sheriff, finding that "'tort' as used in MCL 691.1407(1) is a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages." *Id.* at 385. Where an "action permits an award of damages to a private party as compensation for an injury caused by [a] noncontractual civil wrong, then the action, no matter how it is labeled, seeks to impose tort liability and the GLTA is applicable." *Id.* at 389.

Given this definition, unjust enrichment is a claim for tort liability. Unjust enrichment creates a legal obligation for restitution where a contract does not exist between the parties. *Michigan Educ. Employees Mut. Ins. Co. v. Morris*, 460 Mich. 180, 198 (1999) ("Even though no contract may exist between two parties, under the equitable doctrine of unjust enrichment, a person who has been unjustly enriched at the expense of

another is required to make restitution to the other."). In fact, a claim of unjust enrichment cannot be brought when a contract covering the same matter exists between the parties. *Aetna Cas. & Sur. Co. v. Dow Chemical Co.*, 883 F. Supp. 1101, 1112 (E.D. Mich. 1995) ("unjust enrichment is only applied where there is no express contract between the parties."). It is thus a noncontractual civil wrong, for which Plaintiff is seeking compensation.

Plaintiff will likely attempt to argue that his unjust enrichment claim is more in the nature of an implied contract, rather than a tort. If that were the case, then summary disposition would nonetheless be proper because Plaintiff's unjust enrichment claim would simply be a restatement of his breach of contract claim and therefore properly dismissed as duplicative. *See Belle Isle Grill Corp. v. City of Detroit*, 256 Mich. App. 463, 471 (2003) (trial court did not err in striking redundant claims); MCR 2.115(B) (authorizing Michigan courts to strike redundant claims from pleadings). However, such an argument is belied by Plaintiff's pleading, which must be considered as a whole. "It is well established that the gravamen of an action is determined by reading the claim as a whole, and looking beyond the procedural labels to determine the exact nature of the claim." *David v. Sternberg*, 272 Mich. App. 377, 381 (2006) (quoting *Simmons v. Apex Drug Stores, Inc.*, 201 Mich. App. 250, 253 (1993); *MacDonald v. Barbarotto*, 161 Mich. App. 542, 547 (1987)).

Plaintiff's Count II alleges that Genesee County engaged in wrongful conduct, harming Plaintiff, for which Plaintiff seeks compensatory damages, as follows:

> 43. Genesee County **wrongfully** and unjustly retained a portion of the refunds under the Blue Cross Plan that belong to Genesee County Drain Commissioner.
>
> 44. Genesee County is not entitled to retain Genesee County Drain Commissioner's portion of the refunds issued under the Blue Cross Plan.

45. Due to Genesee County's wrongful retention of Genesee County Drain Commissioner's portion of the refunds, Genesee County has been unjustly enriched.

46. It is inequitable for Genesee County to retain Genesee County Drain Commissioner's portion of the refunds issued under the Blue Cross Plan.

47. Genesee County Drain Commissioner has been harmed by Genesee County's inequitable retention of its refunds. (Pl.'s 2d Am. Compl.) (emphasis added).

Plaintiff's unjust enrichment claim seeks to impose liability on Genesee County for alleged "wrongful" conduct that "harmed" Plaintiff. His proposed cause of action is one of tort liability and is barred by the GTLA. *Id.* Defendant is therefore entitled to summary disposition.

Plaintiff's unjust enrichment claim is otherwise unsustainable.

Plaintiff's unjust enrichment claim also fails because it is not supported by the facts. In order to establish a claim of unjust enrichment, it must be shown that the Defendant received and retained a benefit from Plaintiff, for which Plaintiff was not compensated. *Belle Isle Grill Corp. v. City of Detroit*, 256 Mich. App. 463, 478 (2003) (citing *Barber v. SMH (US), Inc.*, 202 Mich. App. 366 (1993)). In this case, Defendant did not receive a benefit from Plaintiff. The refund Defendant received was from Blue Cross, not Plaintiff, pursuant to its contract with that entity. Plaintiff did not receive and retain a benefit from Plaintiff as required to support a claim of unjust enrichment.

Further, Plaintiff was fully compensated for the funds that he expended for the health care plan premiums. Plaintiff agreed to pay a certain amount for health care premiums for health benefits for his workers, and Plaintiff received those benefits. The allegation that Plaintiff could have obtained insurance at a lower cost does not warrant a

conclusion that Plaintiff was denied the promised benefit. Plaintiff does not allege, and there is no evidence, that his employees did not receive the promised health care benefits.

Plaintiff was promised health insurance coverage for a particular premium. Plaintiff paid that premium, and received the promised benefits. Defendant is therefore entitled to summary disposition on Plaintiff's unjust enrichment claim as a matter of law.

CONCLUSION

Defendant is immune from Plaintiff's unjust enrichment claim, which also otherwise fails. Accordingly, Plaintiff's unjust enrichment claim must be dismissed.

Respectfully submitted,

PLUNKETT COONEY

Dated: 10/22/15

H. William Reising (P19343)
Rhonda R. Stowers (P64083)
Attorneys for Defendants
(810) 342-7001

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

GENESEE COUNTY DRAIN COMMISSIONER,
JEFFREY WRIGHT,

Plaintiff,

-vs-

GENESEE COUNTY,

Defendant.

Case no. 11-97012 CK
Hon. Geoffrey L. Neithercut

HENNEKE, MCKONE, FRAIM & DAWES PC
Scott R. Fraim P35669
Charles R. McCone P24260
Attorneys for Plaintiff
2377 S. Linden Road, Suite B
Flint, MI 48532
810-733-2050

PLUNKETT COONEY
H. William Reising P19343
Attorney for Defendant
111 E. Court Street, Suite 1B
Flint, MI 48502
810-342-7001

NOTICE OF HEARING

PLEASE TAKE NOTICE that at the courthouse in Genesee County, Michigan, on the 23rd day of November, 2015, at 9:30 a.m, or as soon thereafter as counsel may be heard, the undersigned will move the Court to grant their Motion for Partial Summary Disposition.

I hereby certify that I have made personal contact with counsel of record (via correspondence) on October 26, 2015 requesting concurrence in the relief sought in this motion.

Proposed Order: A proposed order for the relief requested is attached to this motion and was served on the attorneys of record.

Respectfully submitted,

PLUNKETT COONEY

Dated: 10/26/15

H. William Reising (P19343)
Rhonda R. Stowers (P64083)
Attorneys for Defendants
(810) 342-7001

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on 10-26, 2015

By: ☒ U.S. Mail ☐ FAX
☐ Hand Delivered ☐ Overnight Courier
☐ Certified Mail ☐ Other

Signature

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

GENESEE COUNTY DRAIN COMMISSIONER,
JEFFREY WRIGHT,

Plaintiff,

-vs-

GENESEE COUNTY,

Defendant.

Case no. 11-97012 CK
Hon. Geoffrey L. Neithercut

HENNEKE, MCKONE, FRAIM & DAWES PC Scott R. Fraim P35669 Charles R. McCone P24260 Attorneys for Plaintiff 2377 S. Linden Road, Suite B Flint, MI 48532 810-733-2050	PLUNKETT COONEY H. William Reising P19343 Attorney for Defendant 111 E. Court Street, Suite 1B Flint, MI 48502 810-342-7001

ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY DISPOSITION

At a session of said Court, held in the City of Flint, County of Genesee, State of Michigan on _____

PRESENT: _____
CIRCUIT COURT JUDGE GEOFFREY L. NEITHERCUT

This matter having come before the court by way of Motion; and the court being fully advised in the premises:

IT IS HEREBY ORDERED that Defendant's Motion for Partial Summary Disposition is granted for the reasons stated on the record.

_____
Honorable Geoffrey L. Neithercut

EXHIBIT 7

STATE OF MICHIGAN
IN THE 7TH CIRCUIT COURT
COUNTY OF GENESEE

GENESEE COUNTY DRAIN COMMISSIONER, JEFFREY WRIGHT,

Plaintiff,

v

GENESEE COUNTY, a Michigan municipal corporation,

Defendant.

Case No. 11-97012-CK
Hon. Geoffrey L. Neithercut

HENNEKE, FRAIM & DAWES, P.C.
By: Scott R. Fraim (P35669)
By: Brandon S. Fraim (P76350)
Attorneys for Plaintiffs
2377 S. Linden Rd., Ste. B
Flint, MI 48532
(810) 733-2050

PLUNKETT COONEY
By: H. William Reising (P19343)
Attorneys for Defendant
111 E. Court Street, Suite 1B
Flint, MI 48502
(810) 342-7001

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION PARTIAL SUMMARY DISPOSITION

Plaintiff, by and through its attorneys Henneke, Fraim & Dawes, P.C., submits its Response in Opposition to Defendant's Motion for Partial Summary Disposition. As its Response, Plaintiff states:

1. Plaintiff states that its Second Amended Complaint speaks for itself; however, Plaintiff asserts that the allegations contained in its Second Amended Complaint consist of more than what Defendant has referenced in its present Motion for Partial Summary Disposition.
2. Denied as untrue for reasons more fully set forth in Plaintiff's Brief in Support of its Response in Opposition to Defendant's Motion for Partial Summary Disposition, attached hereto.

3. Denied as untrue for reasons more fully set forth in Plaintiff's Brief in Support of its Response in Opposition to Defendant's Motion for Partial Summary Disposition, attached hereto.

4. Denied as untrue for reasons more fully set forth in Plaintiff's Brief in Support of its Response in Opposition to Defendant's Motion for Partial Summary Disposition, attached hereto.

WHEREFORE, Plaintiff prays that this Honorable Court dismiss Defendant's Motion for Partial Summary Disposition with prejudice, award Plaintiff attorney fees and costs incurred as a result of this motion, as well as any other relief deemed appropriate.

Respectfully submitted,
HENNEKE, FRAIM & DAWES, P.C.

[signature]

By: Scott R. Fraim (P35669)
By: Brandon S. Fraim (P76350)
Attorneys for Plaintiff

Date: 11.19.15

STATE OF MICHIGAN
IN THE 7TH CIRCUIT COURT
COUNTY OF GENESEE

GENESEE COUNTY DRAIN COMMISSIONER, JEFFREY WRIGHT, Plaintiff, v GENESEE COUNTY, a Michigan municipal corporation, Defendant.	Case No. 11-97012-CK Hon. Geoffrey L. Neithercut

HENNEKE, FRAIM & DAWES, P.C. By: Scott R. Fraim (P35669) By: Brandon S. Fraim (P76350) Attorneys for Plaintiffs 2377 S. Linden Rd., Ste. B Flint, MI 48532 (810) 733-2050	PLUNKETT COONEY By: H. William Reising (P19343) Attorneys for Defendant 111 E. Court Street, Suite 1B Flint, MI 48502 (810) 342-7001

PLAINTIFF'S BRIEF IN SUPPORT OF ITS RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION PARTIAL SUMMARY DISPOSITION

Plaintiff, by and through its attorneys Henneke, Fraim & Dawes, P.C., submits this Brief in Support of its Response in Opposition to Defendant's Motion for Partial Summary Disposition.

INTRODUCTION

Defendant's present Motion for Partial Summary Disposition follows this Court's order entered on or about October 5, 2015, which granted Plaintiff leave to file its Second Amended Complaint in order to add a claim of unjust enrichment. In Defendant's previous objection to Plaintiff's Motion for Leave to Amend, Defendant argued, *inter alia*, that Plaintiff's claim of unjust enrichment is a tort claim, and therefore the Governmental Immunity Tort Liability Act ("GTLA"), MCL 691.1407 *et seq*, barred Plaintiff's claim. Plaintiff responded by showing that its unjust

enrichment claim is an equitable and implied contract claim and therefore the GTLA does not apply. After careful consideration and deliberation, this Court permitted Plaintiff's Second Amended Complaint to add the count of unjust enrichment. Plaintiff's Second Amended Complaint is attached as **Exhibit A.**

FACTS

The basic facts of this case are well-known to the Court and, pursuant to MCR 2.116(C)(8), all of Plaintiff's allegations contained in its Second Amended Complaint are accepted as true, which Defendant has acknowledged. Although Defendant provides a brief accounting of the facts, Defendant has omitted material details, which are all contained within Plaintiff's Second Amended Complaint and should be noted herein. This case concerns a group health care plan ("Group Plan"), through Blue Cross Blue Shield of Michigan ("BCBS"), labeled by BCBS as the "Genesee County" plan in which Plaintiff, Defendant, and Genesee County Community Mental Health Agency ("Mental Health") jointly participated in to provide health care benefits for their respective employees. **Exhibit A,** ¶¶ 7-11. It is crucial to note that when Plaintiff's employees are referenced, it is Plaintiff's Water and Waste Division ("WWS") employees.[1] It is undisputed that the WWS employees are not Genesee County employees. Pursuant to Section 3 of Public Act 342, the Plaintiff's WWS Division has the authority to manage the water and waste system, hire or fire employees, set rates for its services, collect fees, enter into contracts, sue or be sued, all separate and autonomous from Genesee County. Plaintiff's WWS Division is funded by service fees, not by Genesee County. **Exhibit A,** ¶ 32. So, contrary to Defendant's statement, the Group Plan was

[1] There are a few "drain maintenance" employees who are supervised by Plaintiff but are considered to be employees of Genesee County. These "drain maintenance" employees are wholly separate from Plaintiff's WWS employees. While the "drain maintenance employees" health care premiums are paid by Defendant, Plaintiff's WWS employees' health care premiums are paid by Plaintiff's WWS Division. The "drain maintenance" employees number significantly less than WWS employees and are not at issue in this case.

established for the benefit of not just county employees, but also the separate and autonomous WWS employees. **Exhibit A,** ¶ 7. The purpose of the Group Plan was to create a large pool of participating employees in order to lower the overall premium expenses for WWS, Defendant and Mental Health. **Exhibit A,** ¶¶ 7-8. Because each of the three participants had different obligations pursuant to different union contracts and employer obligations to provide certain levels of benefits to their respective employees, each of the three participants established the type or level of health care benefits that would be provided to their respective employees under the Group Plan. BCBS rated each benefit contract the same for each of the three participants so that if the level of benefit for one participant was the same as another participant, the premium would be the same for each.

It is further undisputed that each participant, including Plaintiff, paid into the Group Plan the premiums required to provide health insurance coverage for their own respective employees. **Exhibit A,** ¶¶ 12-16, 37. Through the Group Plan, Plaintiff provided health insurance for its WWS employees, while Defendant provided health insurance for its employees. **Exhibit A,** ¶¶ 15-16. BCBS would determine the monthly and/or annual premium rate to be paid by each participant of the Group Plan and Plaintiff would pay the premiums for its WWS employees. **Exhibit A,** ¶¶ 12-16, 37-38. Defendant and Mental Health likewise separately paid the premiums due for health insurance coverage provided by the Group Plan for their respective employees. *Id.* Each member of the group had its own obligation to pay premiums assessed for their employees that participated in the Group Plan. *Id.*

The Group Plan was administered as an "Experience Rated Service Contract". As such, the participants of the plan would share in any surplus or deficit created in a policy year. **Exhibit A,** ¶¶ 17, 19-20. At the end of each policy period, BCBS would perform an audit of the Group Plan. *Id.* If the premiums paid into the plan in a particular year were insufficient to cover claims

and administrative expenses, BCBS would recover the deficit by adding the deficit to the premiums each of the three participants would be required to pay the next plan year. If the premiums paid into the plan in a particular year exceeded the amount of claims paid and administrative expenses, a portion of this surplus was to be returned to the group. Under this type of Group Plan, the refund of the surplus is made available by BCBS by either offering a refund check paid to the Group Plan or by issuing a credit against premiums that would be due for the following plan year. **Exhibit A,** ¶¶ 20-22. Defendant acted as the Group Plan administrator. **Exhibit A,** ¶¶ 18-19.

When Plaintiff performed an audit of its employee health care benefits under the Group Plan, it was discovered that because of the amount of premiums paid into the Group Plan by the participants, including Plaintiff, a surplus was created in the Group Plan for at least years 2001 through 2008. **Exhibit A,** ¶ 20. This entitled the Group Plan to receive either a refund check or a credit against premiums due for the following plan year. **Exhibit A,** ¶¶ 20-21, 29. These refunds or credits belonged jointly to the participants of the Group Plan as it was the over-payment of premiums to the Group Plan from each of the three participants that created the surplus. **Exhibit A,** ¶¶ 31, 38, 43-46.

Unbeknownst to Plaintiff, Defendant, without notifying or informing Plaintiff, directed BCBS to issue cash refunds to Defendant only for plan years ending in 2005 through 2007. **Exhibit A,** ¶¶ 21-22, 25-29.[2] BCBS issued refund checks for these years in the name of the Group Plan ("Genesee County") and sent the checks to Defendant.[3] *Id.* Instead of distributing the proportionate shares of the refund checks to the Group Plan participants, including Plaintiff,

[2] The amounts of the refund checks are not in dispute and are: $1,426,043 issued on October 24, 2005; $1,228,391 issued on November 6, 2006; and $945,184 issued on December 7, 2007.

[3] Recently, at a deposition of authorized representatives of BCBS, it was discovered that BCBS did not specifically name Defendant as the intended recipient of the refund check. Rather, BCBS made the refund checks payable to the Group Plan, which was coincidently named the "Genesee County" group plan. However, Defendant still kept all of the refund checks without distributing the proportionate shares to the Group Plan participants.

Defendant deposited the entire amounts into its general fund for its own benefit. **Exhibit A, ¶¶** 22, 25-27, 30-32, 43-46. Plaintiff does not have access to and does not financially benefit from Defendant's general fund. Defendant does not fund operation of Plaintiff's WWS division and does not provide any funding for payment of WWS employee wages or payment of their health care insurance. Defendant never notified Plaintiff of the receipt of the refund checks. *Id.* Further, for plan year ending in 2008, which was the last year Plaintiff participated in the Group Plan, Defendant directed BCBS to issue a credit for the refund to the health care plan Defendant was continuing with BCBS without Plaintiff. **Exhibit A, ¶ 33.** This likewise resulted in Defendant receiving and retaining the entire refund amount without providing Plaintiff with its share of the refund. *Id.* For plan years ending in 2005 through 2008 Defendant received and solely retained a total of at least $4,677,767.00 in refunds under the Group Plan, while Plaintiff has received nothing.[4] **Exhibit A, ¶ 25.**

Despite knowing about these Group Plan refunds, Defendant admittedly failed to notify, inform, or discuss with Plaintiff the existence of the refunds or the fact that Defendant was depositing the cash refunds into its own account. **Exhibit A, ¶ 21, 28.** As a result of Defendant's wrongful retention of the surplus monies, Defendant caused Plaintiff to pay higher annual premiums than if the refund had been used as a rate credit or if Plaintiff would have shared in the refund distributions. **Exhibit A, ¶ 24.** When Plaintiff requested that Defendant reimburse Plaintiff for its portion of the annual refunds, Defendant refused. **Exhibit A, ¶ 34.**

STANDARD

Defendant has submitted its Motion for Partial Summary Disposition under MCR 2.116(C)(7) and MCR 2.116(C)(8).

---

[4] This court has previously ruled that Plaintiff is precluded from seeking reimbursement of its portion of the refunds prior to October 24, 2005 due to the applicable statute of limitations.

A party may support a motion for summary disposition pursuant to MCR 2.116(C)(7) "by affidavits, depositions, admissions, or other documentary evidence." *Maiden v Rozwood*, 461 Mich. 109, 119, 597 NW2d 817 (1999). The movant is not required to submit such supporting documentation, nor is the responding party required to respond with the same. *Id.* "The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Id.*, citing *Patterson v Klleman*, 447 Mich 429, 434 n. 6, 526 NW2d 879 (1994). A motion for summary disposition pursuant to MCR 2.116(C)(7) should not be granted unless no factual development could provide a basis for recovery. *Harrison v Dir of Dept of Corr*, 194 Mich App 446, 449; 487 NW2d 799 (1992).

A motion for summary disposition pursuant to MCR 2.116(C)(8), on the other hand, "tests the legal sufficiency of the complaint." *Id.* **"All well-pleaded factual allegations are accepted as true and construed in the light most favorable to the non-movant."** *Id.* (emphasis added). Accordingly, a motion under this sub-rule may be granted "only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possible justify recovery.'" *Id.*, citing *Wade*, 439 Mich at 163. Therefore, when the court rules on a motion brought under this sub-rule, it considers only the pleadings. *Id.*, citing MCR 2.116(G)(5).

LAW & ARGUMENT

I. GOVERNMENTAL IMMUNITY DOES NOT APPLY TO PLAINTIFF'S CAUSE OF ACTION FOR UNJUST ENRICHMENT

A. Governmental Immunity Does Not Apply To Plaintiff's Claim for Unjust Enrichment Because Unjust Enrichment is an Action for an Implied Contract.

The GTLA, under MCL 691.1407(1), only operates to bar damages from "*tort liability* if the governmental agency is engaged in the exercise or discharge of a governmental function" and Defendant concedes in its own Brief that the GTLA does not bar damages for a claim sounded in

contract. *See Defendant's Brief In Support of its Motion for Partial Summary Disposition, page 5.* In Michigan, the GTLA does not preclude or bar implied contract claims. *See Rocco v Michigan Dept of Mental Health*, 114 Mich App 792, 799; 319 NW2d 674, 677 (1982). Under an unjust enrichment claim, the law implies a contract in order to prevent inequity. *Belle Isle Grill Corp v City of Detroit*, 256 Mich App 463, 478; 666 NW2d 271, 280 (2003). The Michigan Supreme Court has held that under the equitable doctrine of unjust enrichment, the "law sometimes indulges in the fiction of a quasi or constructive contract," and that the doctrine "vitiates normal contract principles." *Kammer Asphalt Paving Co, Inc v E China Tp Sch*, 443 Mich 176, 185-86; 504 NW2d 635, 640 (1993)(emphasis added). The Michigan Supreme Court has further held that unjust enrichment is the equitable counterpart to a breach of express contract claim. *Tkachik v Mandeville*, 487 Mich 38, 48-49, 790 NW2d 260 (2010)(emphasis added). Therefore, unjust enrichment is contractual by its very nature. The contract must be implied, written in after-the-fact by the court in order to prevent the inequity of the defendant wrongfully retaining a certain ill-gotten benefit. Because unjust enrichment is inherently contractual and implies a contract, the GTLA does not apply.

Similar to the case at hand, in *Gen Motors, LLC v Comerica Bank*, No. 291236, 2010 WL 5174515 (Mich Ct App December 21, 2010), attached as **Exhibit B**, General Motors overpaid a third-party supplier through Comerica Bank. After the overpayment was discovered, instead of issuing the refund to General Motors, Comerica Bank retained and used the refund for its own benefit. The court affirmed that Comerica Bank was unjustly enriched by retaining General Motor's refund due to its overpayment to a third-party. The court further denied Comerica Bank's assertion that General Motor's claim of unjust enrichment was really a tortious action of conversation and reiterated that General Motor's claim of unjust enrichment instead implies a

contract between the parties. Likewise here, Defendant has retained the benefit of Plaintiff's overpayments and unjustly used this benefit for its own purposes.

Defendant's purported authority of *In re Bradley Estate*, 494 Mich 367; 835 NW2d 545 (2013), which Defendant relies on to support its argument, is both factually and legally distinguishable to the case at hand. In that case, the petitioner submitted a civil contempt petition under MCL 600.1721 against a governmental employee in an effort to hold the employee responsible for an alleged wrongful death claim. *Id.*, at 373-74. The court determined that the civil contempt statute of MCL 600.1721, coupled with the allegations of wrongful death, sought a *noncontractual* remedy of compensatory damages against a governmental employee and was barred as a tort claim under the GTLA. *Id.* at 397-98. *In re Bradley Estate* only addressed the applicability of the GTLA with a non-relevant civil contempt statute, coupled with wrongful death allegations, and never addressed an unjust enrichment claim or similar claim. Contrarily, *In re Bradley Estate* expressly referenced Plaintiff's authority of *Rocco v Michigan Dept of Mental Health, supra*, and acknowledged that the court has held that the GTLA does not apply to implied contract claims. *Id.* at 386-88.

For these reasons, Defendant's Motion for Partial Summary Disposition pursuant to MCR 2.116(C)(7) should be dismissed with prejudice.

B. Governmental Immunity Does Not Apply Because Plaintiff's Claim for Unjust Enrichment is a Claim for Equitable Relief.

In addition, GTLA does not apply to Plaintiff's unjust enrichment claim because it is an equitable claim. Defendant fails to recognize that Michigan courts have repeatedly held that equitable claims do not fall under the operation of the GLTA. *See Lash v City of Traverse City*, 479 Mich 180, 197, 735 NW2d 628 (2007) (plaintiff permitted to seek injunctive and declaratory relief against defendant which would not be barred by GTLA); *Mercer v City of Lansing*, 274 Mich

App 329, 330-331, 733 NW2d 89 (2007) (plaintiff entitled to pursue action for writ of mandamus against governmental official because it is equitable relief and therefore not subject to GTLA); *Wayne Co Sheriff v Wayne Co Bd of Commissioners*, 196 Mich App 498, 510, 494 NW2d 14 (1992) ("although phrased as an action for money damages, [plaintiff's claim] is in actuality an equitable action for reimbursement of fees or for mandamus" and therefore falls outside the requirements of the GTLA); and *Gaskin v City of Jackson*, 2012 WL 2865781 ("plaintiffs' claims are not barred by governmental immunity to the extent they seek equitable relief"), attached as **Exhibit C.**

Defendant itself concedes that Plaintiff's unjust enrichment claim is an equitable claim. *See Defendant's Brief in Support of its Motion for Partial Summary Disposition, page 5 ("under the equitable doctrine of unjust enrichment...").* It is well established under Michigan law that unjust enrichment is an equitable claim. As discussed *supra*, the Michigan Supreme Court explicitly held that unjust enrichment is the equitable counterpart to a breach of express contract claim. *Tkachik v Mandeville*, 487 Mich 38, 48-49, 790 NW2d 260 (2010)(emphasis added). A finding of unjust enrichment "requires a consideration of both legal *and* equitable factors. Thus, even though by operation of law defendant received the property 'absolutely,' he is still unjustly enriched if he is obligated by *equity* to make restitution." *Id.*

Notably, Defendant does not cite any authority which addresses a claim of unjust enrichment against a governmental entity, nor does Defendant proffer any authority in which a claim of unjust enrichment is barred by governmental immunity. In light of the multiple authorities cited above, Michigan law is clear that: (1) the GTLA does not operate to bar implied contract claims, (2) the GTLA does not operate to bar claims for equitable relief, and (3) that Plaintiff's unjust enrichment claim is both an implied contract claim and an equitable claim. Consequently,

Defendant's Motion for Partial Summary Disposition pursuant to MCR 2.116(C)(7) fails as a matter of law. Therefore, Plaintiff respectfully requests and this Court deny Defendant's Motion for Partial Summary Disposition pursuant to MCR 2.116(C)(7) with prejudice.

II. PLAINTIFF HAS SUFFICIENTLY PLED A CLAIM FOR UNJUST ENRICHMENT.

Contrary to Defendant's assertion, Plaintiff has sufficiently pled a cause of action for unjust enrichment pursuant to MCR 2.116(C)(8). Oddly, Defendant appears to conflate the standard for summary disposition under MCR 2.116(C)(8) with a motion for summary disposition under MCR 2.116(C)(10) when Defendant argues the "unjust enrichment claim also fails because it is not supported by the facts." *Defendant's Motion for Partial Summary Disposition, page 7*. Yet, Defendant clearly states that its Motion for Partial Summary Disposition is brought under sub-rules (C)(7) and (C)(8). In deciding a motion under MCR 2.116(C)(8), the court examines the legal sufficiency—*not the factual sufficiency*—of the complaint. *Maiden v Rozwood*, 461 Mich. 109, 119, 597 NW2d 817 (1999). Rather, "[a]ll well-pleaded factual allegations are accepted as true and construed in the light most favorable to the non-movant." *Id.*, citing *Wade v Dept of Corrections*, 439 Mich 158, 162, 483 NW2d 26 (1992). Thus, the bulk of Defendant's argument on this point is misses the issue entirely.

Regardless, Plaintiff has established the elements of its unjust enrichment claim from its allegations contained in its Second Amended Complaint, as well as through existing facts. Moreover, Plaintiff's claim for unjust enrichment will likely only be reinforced from facts yet to be revealed in this case's ongoing discovery. In fact, George Martini, Defendant's Controller at the time the relevant events occurred, was recently deposed and revealed relevant and material facts, including his own admission that Defendant should have provided Plaintiff with a portion of the refunds received under the Group Plan.

The elements of an unjust enrichment claim are "(1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant." *Belle Isle*, 256 Mich at 478. The undisputed facts, which are alleged in Plaintiff's Second Amended Complaint are set forth more fully earlier herein. In sum, the Group Plan participants, including Plaintiff, overpaid insurance premiums into the Group Plan, and due to the overpayments, BCBS allowed a credit or refund of the surplus to the Group Plan participants. However, unbeknownst to Plaintiff, Defendant, without notifying or informing Plaintiff, kept for itself the entirety of these substantial cash and credit refunds and used these substantial refunds for its own purposes. These refunds belonged jointly to the group participants, including a substantial portion to Plaintiff. If instead of Defendant taking cash refunds, a rate credit was taken for the surplus, the premiums for the Group Plan participants, including Plaintiff, would have been lower. Rather, Defendant received a benefit derived from Plaintiff's overpayment, which was inequitable for it to retain. Moreover, Defendant received the benefit from Plaintiff, not Blue Cross, ***as Defendant kept and used the money belonging to Plaintiff***, not Blue Cross. Consequently, Plaintiff has alleged and established sufficient facts to support a claim for unjust enrichment.

Therefore, Defendant's Motion for Partial Summary Disposition pursuant to MCR 2.116(C)(8) must fail. Accordingly, Plaintiff respectfully requests this Court to dismiss Plaintiff's Motion for Partial Summary Disposition with prejudice.

CONCLUSION

WHEREFORE, Plaintiff respectfully requests that this Honorable Court dismiss Defendant's Motion for Partial Summary Disposition in its entirety with prejudice, award Plaintiff attorney fees and costs incurred as a result of having to respond to this Motion, and award any other relief deemed appropriate.

Respectfully submitted,
HENNEKE, FRAIM & DAWES, P.C.

Date: 11-A-15

By: Scott R. Fraim (P35669)
By: Brandon S. Fraim (P76350)
Attorneys for Plaintiff
2377 S. Linden Road, Suite B
Flint, Michigan 48532
(810) 733-2050

Exhibit A

STATE OF MICHIGAN
IN THE 7TH CIRCUIT COURT
COUNTY OF GENESEE

GENESEE COUNTY DRAIN COMMISSIONER, JEFFREY WRIGHT, Plaintiff, v GENESEE COUNTY, a Michigan municipal corporation, Defendant.	Case No. 11-97012-CK Hon. Geoffrey L. Neithercut PLAINTIFF'S SECOND AMENDED COMPLAINT

HENNEKE, FRAIM & DAWES, P.C.
By: Scott R. Fraim (P35669)
By: Brandon S. Fraim (P76350)
Attorneys for Plaintiffs
2377 S. Linden Rd., Ste. B
Flint, MI 48532
(810) 733-2050

PLUNKETT COONEY
By: H. William Reising (P19343)
Attorneys for Defendant
111 E. Court Street, Suite 1B
Flint, MI 48502
(810) 342-7001

PLAINTIFF'S SECOND AMENDED COMPLAINT

There is no other pending or resolved civil action arising out of the same transaction or occurrences as alleged in the Complaint.

Scott R. Fraim (P35669)

Plaintiff, Genesee County Drain Commissioner, for its Second Amended Complaint against Defendant, Genesee County, states:

GENERAL ALLEGATIONS

1. Plaintiff, the Genesee County Drain Commissioner, Jeffrey Wright, ("Genesee County Drain Commissioner"), is the duly elected drain commissioner for Genesee County, Michigan.

2. Defendant, Genesee County ("Genesee County"), is a Michigan municipal corporation located in Genesee County, Michigan.
3. The amount in controversy in this matter exceeds $25,000.00.
4. The acts and violations described in this Complaint have been conceived, carried out, and made effective within Genesee County, Michigan by reason of Genesee County's conduct and actions performed within this county and therefore venue is proper with this Court.
5. The Genesee County Drain Commissioner in his capacity as the County Agency has established a water distribution system that provides water service to users in several cities, townships, and villages throughout Genesee County.
6. The Genesee County Drain Commissioner in his capacity as County Agency provides sanitary sewer services to users in several cities, townships, and villages throughout Genesee County.
7. At a date unknown to Plaintiffs, Genesee County, Genesee County Community Mental Health Agency ("Mental Health") and the Genesee County Drain Commissioner entered into an agreement to purchase as a group or cluster, health insurance coverage from Blue Cross/Blue Shield of Michigan ("Blue Cross") for the benefit of their respective employees. Genesee County, Mental Health, and the Genesee County Drain Commissioner are collectively referred to as the "Plan Group".
8. A purpose of the group or cluster was to create a larger pool of participating employees with the benefit of lowering overall premium cost for health insurance and for the more efficient administration of health insurance benefits for the Plan Group.
9. The Plan Group was identified by Blue Cross as Cluster 0300 (the "Blue Cross Plan").
10. The Blue Cross Plan arrangement continued in effect until approximately June 2008.

11. Employees of each member of the Plan Group participated in the Blue Cross Plan.

12. On information and belief, for all times that the Blue Cross Plan remained in effect, Blue Cross would determine the monthly and/or annual premium rate to be paid by the Plan Group which for the Genesee County Drain Commissioner, was determined by insurance ratings on its employees participating in the Blue Cross Plan.

13. The Genesee County Drain Commissioner was invoiced for the amount of premiums due for health insurance coverage provided by the Blue Cross Plan to its employees.

14. On information and belief, Genesee County and Mental Health were likewise separately invoiced for the amount of premiums due for health insurance coverage provided by the Blue Cross Plan for their respective employees.

15. Each member of the Plan Group had the obligation to pay premiums assessed for their employees that participated in the Blue Cross Plan.

16. Each member of the Plan Group paid Blue Cross the premiums invoiced for their employees that participated in the Blue Cross Plan.

17. Blue Cross would annually audit the claims experience of the Blue Cross Plan and would then establish premiums for health insurance coverage for the following year.

18. Genesee County acted as a fiduciary of the Blue Cross Plan and on information and belief acted as the plan administrator.

19. Blue Cross provided a settlement accounting to Genesee County for each year of the Blue Cross Plan.

20. For all plan years from 2001 through 2008, the Blue Cross annual settlement accounting revealed that premiums paid for the Blue Cross Plan substantially exceeded claims paid, administration expenses, and necessary reserves for such plan year. It is currently unknown

by Plaintiffs if settlement accounting in years prior to 2001 likewise revealed substantial surpluses.

21. Unbeknown to the Genesee County Drain Commissioner, Blue Cross gave Genesee County the option of whether to leave the surplus in the Blue Cross Plan for the next plan year so as to reduce premiums chargeable for the next plan year or to receive a refund of the surplus.

22. Each year of the Blue Cross Plan, Genesee County opted to receive a refund of the surplus from the plan.

23. If the surplus had been left within the Blue Cross Plan, the premium charged to each member of the Plan Group would have been reduced the following plan year.

24. Because of Genesee County's decision to take a distribution of the surplus each year, the premiums charged to the Genesee County Drain Commissioner for the following plan year were higher than what they would have been absent a refund of the surplus.

25. Over the life of the Blue Cross Plan, Blue Cross paid Genesee County millions of dollars in refunds of surplus premiums.

26. At the direction of Genesee County, Blue Cross would deliver a refund check to Genesee County following the end of each plan year with such refund checks being made payable solely to Genesee County.

27. On information and belief, Genesee County deposited the refund checks from the Blue Cross Plan into its general fund.

28. Genesee County never communicated to the Genesee County Drain Commissioner that it was receiving these substantial checks for refunds from the Blue Cross Plan.

29. The Genesee County Drain Commissioner only discovered that Genesee County was withdrawing refunds from the Blue Cross Plan when it had a review performed of its health care expenditures.

30. The Genesee County Drain Commissioner, for the life of the Blue Cross Plan, paid its proportionate share of premiums assessed for health care insurance.

31. As a member of the Plan Group, the Genesee County Drain Commissioner was entitled to a portion of the refund based upon its participation in the Blue Cross Plan.

32. Payments made for premiums due the Blue Cross Plan by the Genesee County Drain Commissioner were from service fees received from water and/or sewer users.

33. When the Blue Cross Plan was terminated in approximately June 2008, there also remained a surplus in the plan. Upon information and belief, Genesee County either withdrew this final surplus as an additional refund distribution or applied the refund as a credit to the replacement health care plan adopted by Genesee County.

34. The Genesee County Drain Commissioner has made numerous demands to Genesee County for repayment of the Drain Commissioner's proportionate share of refunds and surpluses arising under the Blue Cross Plan.

35. Genesee County has refused to make payment to the Genesee County Drain Commissioner.

COUNT I - BREACH OF CONTRACT

36. Plaintiffs incorporate paragraphs 1 through 35 by reference.

37. The Genesee County Drain Commissioner, Mental Health, and Genesee County, as the three members of the Plan Group were each responsible to pay premiums charged to each of them respectively for health care insurance coverage provided their respective employees participating in the Blue Cross Plan.

38. Because each of the members of the Plan Group paid premiums based upon their respective employees that participated in the Blue Cross Plan, all refunds received by Genesee County would belong jointly to the Plan Group and not solely to Genesee County.

39. Failure to pay over to the Genesee County Drain Commissioner his proportionate share of all refunds constitutes a breach of contract.

40. The entire amount due and owing to the Genesee County Drain Commissioner from Genesee County is uncertain; but the amount due and owing which is currently known by the Drain Commissioner is in excess of $2,700,000.

41. Genesee County had a duty to repay the Genesee County Drain Commission his proportionate share of all refunds from the Blue Cross Plan and has failed to do so.

WHEREFORE, the Genesee County Drain Commissioner requests that this Court enter judgment against Defendants in an amount in excess of $2,700,000 plus interest, costs, and attorney's fees.

COUNT II – UNJUST ENRICHMENT

42. Plaintiff incorporates paragraphs 1 through 41 by reference.

43. Genesee County wrongfully and unjustly retained a portion of the refunds under the Blue Cross Plan that belong to Genesee County Drain Commissioner.

44. Genesee County is not entitled to retain Genesee County Drain Commissioner's portion of the refunds issued under the Blue Cross Plan.

45. Due to Genesee County's wrongful retention of Genesee County Drain Commissioner's portion of the refunds, Genesee County has been unjustly enriched.

46. It is inequitable for Genesee County to retain Genesee County Drain Commissioner's portion of the refunds issued under the Blue Cross Plan.

47. Genesee County Drain Commissioner has been harmed by Genesee County's inequitable retention of its refunds.

WHEREFORE, the Genesee County Drain Commissioner requests that this Court enter judgment against Defendants in an amount in excess of $2,700,000 plus interest, costs, and attorney's fees.

Respectfully submitted,
HENNEKE, FRAIM & DAWES, P.C.

Date: 10-6-15

By: Scott R. Fraim (P35669)
By: Brandon S. Fraim (P76350)
Attorneys for Plaintiff
2377 S Linden Rd, Suite B
Flint, MI 48532
(810) 733-2050

JURY DEMAND

Plaintiff, by and through their attorneys, Henneke, Fraim & Dawes, P.C., hereby demands a trial by jury of the above-entitled cause.

Respectfully submitted,
HENNEKE, FRAIM & DAWES, P.C.

Date: 10.6.15

By: Scott R. Fraim (P35669)
By: Brandon S. Fraim (P76350)
Attorneys for Plaintiff
2377 S Linden Rd, Suite B
Flint, MI 48532
(810) 733-2050

Exhibit B

2010 WL 5174515
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

GENERAL MOTORS, L.L.C., Plaintiff-Appellee,
v.
COMERICA BANK, Defendant-Appellant.

Docket No. 291236. | Dec. 21, 2010.

Wayne Circuit Court; LC No. 06-618803-CZ.

Before: DONOFRIO, P.J., and CAVANAGH and FITZGERALD, JJ.

Opinion

PER CURIAM.

*1 Defendant Comerica Bank ("Comerica") appeals as of right from a judgment of $744,255 entered in favor of plaintiff General Motors, L.L.C. ("GM"), after the trial court granted GM's motion for partial summary disposition on its unjust enrichment claim. Because neither the statute of limitations barred nor the Uniform Commercial Code displaced GM's claim for unjust enrichment, we affirm.

I. BACKGROUND

This appeal involves the final two of five overpayments that GM made to a supplier, Hy-Lift, L.L.C. ("Hy-Lift"). GM made each payment by electronic transfer into a Comerica account maintained by Hy-Lift, but which was also used as collateral for Comerica's revolving credit loan to Hy-Lift. GM made the two overpayments at issue in this appeal on June 28, 2000. Comerica applied the overpayments to pay down Hy-Lift's revolving credit loan. Comerica identified the overpayments during an audit of Hy-Lift's collateral account in August 2000, but continued to consider the overpayments as having paid down Hy-Lift's revolving credit loan when determining the amount that Hy-Lift could borrow.

In 2002, Hy-Lift became entrenched in a federal bankruptcy proceeding. In December 2004, GM filed an action against Comerica, Hy-Lift, and others in connection with the overpayments, but that case was administratively closed, without prejudice, because of a stay issued in the bankruptcy proceeding. GM later filed this action in June 2006. GM's complaint against Comerica sought to recover the overpayments based on theories of unjust enrichment and constructive trust. Comerica claimed that it was entitled to retain the overpayments as a secured creditor of Hy-Lift. The parties filed cross-motions for summary disposition in 2007. In relevant part, the trial court denied Comerica's motion, which it brought under MCR 2.116(C)(7) (statute of limitations) and (10) (no genuine issue of material fact.) The trial court granted GM's motion for partial summary disposition, which was based on the two June 28, 2000, overpayments, and awarded GM judgment in the amount of $744,255. Following further motions, including a "renewed" motion for summary disposition brought by Comerica with respect to the June 28, 2000, overpayments, which the trial court treated as a motion for reconsideration and then denied, the trial court entered a final judgment of $744,255 in favor of GM.

II. STANDARD OF REVIEW

We review a trial court's summary disposition ruling de novo. *Barnard Mfg. Co. v. Gates Performance Engineering, Inc.*, 285 Mich.App 362, 369; 775 NW2d 618 (2009). Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred by a statute of limitations. In reviewing such a motion, the contents of the complaint are accepted as true unless contracted by documentary evidence. *RDM Holdings, Ltd. v. Continental Plastics Co.*, 281 Mich.App 678, 687; 762 NW2d 529 (2008). Where the facts are not disputed, whether a cause of action is barred by the applicable limitations period is a question of law. *Joliet v. Pitoniak*, 475 Mich. 30, 35; 715 NW2d 60 (2006). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim based on substantively admissible evidence. MCR 2.116(G)(6); *Adair v. Mich.*, 470 Mich. 105, 120; 680 NW2d 386 (2004); *Maiden v. Rozwood*, 461 Mich. 109, 120-121; 597 NW2d 817 (1999). Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Healing Place at North Oakland Med. Ctr. v. Allstate Ins. Co.*, 277 Mich.App 51, 56; 744 NW2d 174 (2007). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the

nonmoving party."*Allison v. AEW Capital Mgt., LLP*, 481 Mich. 419, 425; 751 NW2d 8 (2008).

*2 This Court also reviews issues of statutory interpretation de novo.*Healing Place at North Oakland Med. Ctr.*, 277 Mich.App at 55. This Court begins the analysis with the specific statutory language at issue. *Id.* at 58.If there is no ambiguity, the statute is applied as written. *Id.* at 59.A statute is ambiguous if a provision irreconcilably conflicts with another provision or is equally susceptible to more than one meaning. *Kmart Mich. Prop. Servs., LLC v. Dep't. of Treasury*, 283 Mich.App 647, 650; 770 NW2d 915 (2009).

Equity cases are also reviewed de novo on the record. *Tkachik v. Mandeville*, 487 Mich. 38, 44; — NW2d — (2010); *Morris Pumps v. Centerline Piping, Inc.*, 273 Mich.App 187, 193; 729 NW2d 898 (2006). The granting of equitable relief to a party is ordinarily a matter of grace.*Tkachik*, 487 Mich. at 45. "Equity allows 'complete justice' to be done in a case by 'adapt[ing] its judgment[s] to the special circumstances of the case.' " *Id.* at 46, quoting 27A Am Jur 2d, Equity, § 2, at 520-521.

III. MCR 2.116(C)(10)

Comerica argues that GM was not entitled to summary disposition on its unjust enrichment and constructive trust claims because the parties' rights are instead governed by Article 9 of the Uniform Commercial Code (UCC), MCL 440.9101 *et seq.*

Initially, we point out that in arguing this issue, both parties improperly rely on evidence that was only presented in connection with Comerica's "renewed" motion for summary disposition, which the trial court treated as a motion for reconsideration. A trial court's grant or denial of a motion for reconsideration is discretionary. *Woods v. SLB Prop. Mgmt., LLC*, 277 Mich.App 622, 629-630; 750 NW2d 228 (2008). Because this issue does not involve a challenge to the trial court's denial of reconsideration, but rather a challenge to the trial court's original summary disposition ruling, it is inappropriate to consider the evidence that was presented with the "renewed" motion. See *Barnard Mfg. Co.*, 285 Mich.App at 380-381 (when reviewing a motion for summary disposition, this Court limits its review to evidence properly presented to the trial court). Comerica does not separately address the trial court's denial of its "renewed" motion, thereby abandoning any challenge to that decision. *Prince v. MacDonald*, 237 Mich.App 186, 197; 602 NW2d 834 (1999); see also *Roberts & Son Contracting, Inc. v. North Oakland Dev. Corp.*, 163 Mich.App 109, 113; 413 NW2d 744 (1987).[1]

We also decline to consider Comerica's argument first raised in its reply brief that, to the extent the UCC does not apply, GM did not establish a viable unjust enrichment claim. "Reply briefs may contain only rebuttal argument, and raising an issue for the first time in a reply brief is not sufficient to present the issue for appeal."*Blazer Foods, Inc. v. Restaurant Props., Inc.* 259 Mich.App 241, 252; 673 NW2d 805 (2003); see also MCR 7.212(G); *Curry v. Meijer, Inc.*, 286 Mich.App 586, 596 n. 5; 780 NW2d 603 (2009).

*3 Nonetheless, for purposes of our review of Comerica's argument based on the UCC, we observe that unjust enrichment is a cognizable equitable action in which a payor seeks restitution for money paid by mistake, even where the mistake was due to the payor's lack of investigation. *Sentry Ins. v. ClaimsCo Int'l., Inc.*, 239 Mich.App 443, 452; 608 NW2d 519 (2000). The mistaken payment is regarded as an involuntary payment. *Wilson v. Newman*, 463 Mich. 435, 442; 617 NW2d 318 (2000). But the mistake of fact rule has not been applied where the payment has caused such a change of circumstances that it would be unjust to require a refund of the mistaken payment. *Id.* at 441.Stated otherwise, a payor is not precluded from availing itself of the mistake if the other party can be relieved of any prejudice caused by the mistaken payment. *Id.* at 442.A claim of unjust enrichment requires that the plaintiff establish "(1) the receipt of a benefit by the defendant from the plaintiff and (2) an equity resulting to the plaintiff because of the retention of the benefit by the defendant."*Morris Pumps*, 273 Mich.App at 195. If these elements are satisfied, the law will imply a contract to prevent unjust enrichment. *Id.* at 195.

A constructive trust may also be imposed to avoid unjust enrichment. *Morris Pumps*, 273 Mich.App at 202. A constructive trust arises by operation of law where the circumstances under which property was acquired make it inequitable for the recipient to hold legal title. *Kent v. Klein*, 352 Mich. 652, 657-658; 91 NW2d 11 (1958). A court of equity may shape a constructive trust remedy to the circumstances before it. *Union Guardian Trust Co. v. Emery*, 292 Mich. 394, 406; 290 NW 841 (1940). In this case, however, it is unnecessary to consider GM's constructive trust claim because the trial court did not impose a constructive trust on any property. Rather, it awarded GM a monetary

judgment consistent with a restitution remedy for unjust enrichment. Accordingly, we need only determine whether the trial court properly concluded that the UCC did not preclude GM from obtaining the restitution remedy based on unjust enrichment.

"The UCC is a highly integrated body of statutes whose provisions must be carefully read as such. Fair and just application of the UCC rarely involves reference to only one or a few of its provisions in isolation."*Yamaha Motor Corp., USA v. Tri-City Motors & Sports, Inc.*, 171 Mich.App 260, 270; 429 NW2d 871 (1988). Here, the starting point in determining the applicability of the UCC is MCL 440.1103, which provides:

> Unless displaced by the particular provisions of this act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

Accordingly, Comerica must demonstrate that a particular provision of the UCC displaces GM's claim for unjust enrichment. *Gen. Equip. Mfr. v. Bible Press, Inc.*, 10 Mich.App 676, 680; 160 NW2d 370 (1968). Specifically, Comerica must demonstrate a particular provision in Article 9 of the UCC that displaces the unjust enrichment claim arising from GM's June 28, 2000, overpayments.

*4 Article 9 was substantially amended by 2000 PA 348, effective July 1, 2001. *In re Estate of Moukalled*, 269 Mich.App 708, 714; 714 NW2d 400 (2006). The amendatory act generally applies to actions commenced after its effective date. *Prime Fin. Servs., LLC v. Vinton*, 279 Mich.App 245, 258; 761 NW2d 694 (2008). The amendatory act also generally applies to a "transaction or lien within its scope, even if the transaction or lien was entered into or created before this amendatory act takes effect."MCL 440.9702(1). It also determines the "priority of conflicting claims to collateral," except that "if the relative priorities of the claims were established" before the amendatory act, Article 9 "as in effect before this amendatory act takes effect determines priority."MCL 440.9709(1).

Because this case involves GM's equitable claim based on conduct that occurred before the amendatory act became effective, and Comerica's argument that the UCC provides it with priority to the June 28, 2000, overpayments, we reject Comerica's claim that the current version of Article 9 applies. Cf. *Prime Fin. Servs., LLC*, 279 Mich.App at 258 (prior version of UCC applies where common-law claims were based on propriety of bank's actions under the prior version of Article 9, and where the relative priorities were established before the effective date of the amendatory act).

In any event, Comerica's reliance on the priority rules in the current version of Article 9 for "conflicting security interests in the same deposit account,"MCL 440.9327, and a transferee's rights to take funds from a deposit account free of a security interest, MCL 440.9332(2), is misplaced because GM did not acquire a security interest in Hy-Lift's deposit account by making an overpayment. A "security interest" under both the prior and current versions of the UCC means, in part, "an interest in personal property or fixtures which secures payment or performance of an obligation...."MCL 440.1201(37). Because GM did not have a security interest, Comerica has not established anything in current MCL 440.9327 or 440.9332(2) that could be said to have displaced GM's unjust enrichment claim.

And while the provision in MCL 440.9201 that a "security agreement" is effective against "creditors," is contained in both the prior and current versions of Article 9, we need not reach the issue whether GM could be viewed as a "creditor" of Hy-Lift, as defined in MCL 440.1201(12). We recognize that this statutory term includes a "general creditor." *Id.* The term "creditor," while not statutorily defined, is a broad term that may include one who is owed a debt, or even a claim arising out of tort. See *Ford v. Maney's Estate*, 251 Mich. 461, 394-395; 232 NW 393 (1930), and *Chicago Title Ins. Co. v. Mary B.*, 190 Md App 305, 316; 988 A.2d 1044 (2010), cert gtd 415 Md 38 (2010). A general creditor has no legal right or interest in a debtor's property and, therefore, could not be injured by a debtor's disposal of the property to evade payment. *Van Royen v. Lacey*, 262 Md 94, 99; 277 A.2d 13 (1971).

*5 In this case, however, GM's claim is based on Hy-Lift not acquiring rights to the June 28, 2000, overpayments, which were deposited into an account controlled by Comerica. Further, Comerica's security agreement with Hy-Lift is merely an agreement that creates or provides for a security interest under both the prior version of Article 9, MCL

440.9105(1)(l), and the current version, MCL 440.9102(1)(tt). Under both versions, a security interest does not attach, and is not enforceable against a debtor or third party with respect to collateral, unless the debtor acquires rights in the collateral or the right to transfer the collateral. See MCL 440.9203; *Prime Fin. Servs., LLC*, 279 Mich.App at 263-264. The nature of the debtor's rights need not be absolute. *Valley Nat'l. Bank v. Cotton Growers Hail Ins.*, 155 Ariz 526, 529; 747 NW2d 1225 (1987). But mere possession is inadequate. *Litwiller Machine & Mfg., Inc. v. NBD Alpena Bank*, 184 Mich.App 369, 374; 457 NW2d 163 (1990); see also *Wawak v. Affiliated Food Stores, Inc.*, 306 Ark 186, 189; 812 S.W.2d 679 (1991). As explained in *Jerke Constr., Inc. v. Home Fed. Savings Bank*, 693 NW2d 59, 62-63 (SD, 2005):[2]

> The phrase "rights in the collateral" describes the range of transferable interests that a debtor may possess in property. For example, such rights may be as comprehensive as full ownership of property with legal title or as limited as a license. "Essentially, the debtor normally can only convey something once it has something and that something may be less than the full bundle of rights that one may hold in such property." Formal title is not required for a debtor to have rights in collateral. An equitable interest can suffice.... On the other hand, mere naked possession does not create "rights in the collateral." [Citations omitted.]

Because Comerica has failed to establish any evidence or legal basis for concluding that Hy-Lift acquired rights in GM's June 28, 2008, overpayments by means of GM's mere deposit of the overpayments in Hy-Lift's account, we conclude that Comerica's claim that Article 9 of the UCC displaces GM's unjust enrichment claim fails as a matter of law. Accordingly, we affirm the trial court's grant of summary disposition in favor of GM with respect to its restitution claim based on the June 28, 2000, overpayments.

IV. SUMMARY DISPOSITION UNDER MCR 2.116(C)(7)

Comerica next argues that the trial court erred in denying its motion under MCR 2.116(C)(7) based on the statute of limitations. Comerica argues that GM's claim is governed by the three-year limitations period for "actions to recover damages for ... injury to ... property" in MCL 600.5805(10).[3]

To determine the applicable statute of limitations, it is necessary to determine the true nature of GM's claim, reading its complaint as a whole. *Tenneco, Inc. v. Amerisure Mut. Ins. Co.*, 281 Mich.App 429, 457; 761 NW2d 846 (2008). "The prescribed period of limitations shall apply equally to all actions whether equitable or legal relief is sought." MCL 600.5815; see also *Terlecki v. Stewart*, 278 Mich.App 644, 658; 754 NW2d 899 (2008). MCL 600.5815 evidences "a legislative intent to subject equity actions to the same statute of limitations available for law actions, thereby modifying the prior judicial practice of applying a statute of limitations by analogy in an equity action." *Eberhard v. Harper-Grace Hosps.*, 179 Mich.App 24, 36; 445 NW2d 469 (1989).

*6 In *Attorney General v. Harkins*, 257 Mich.App 564, 570-571; 669 NW2d 296 (2003), this Court, relying on MCL 600.5815, found that MCL 600.5813 was applicable to an action for injunctive relief sought by a plaintiff for violation of a statute that did not contain its own limitations period. In *Tenneco, Inc.*, 281 Mich.App at 454-458, this Court found that the six-year limitations period for contract actions in MCL 600.5807(8) applied where the plaintiff styled a lawsuit as an action for declaratory relief, but the gravamen of the claim sought to recover monetary damages for breach of contract.

In *Hulsala v. Travelers Ins. Co.*, 401 Mich.App 118, 124-125; 257 NW2d 640 (1977), our Supreme Court found that a claim for promissory estoppel was subject to the six-year limitations period for contract actions because it was based on a rule of contract law that renders a promise binding where injustice could only be avoided by its enforcement and the "promisor should reasonably expect to induce forbearance by the promisee or a third person and which does induce forbearance." Our Supreme Court also observed that "[w]here the nature and origin of an action to recover damages for injury to persons or property is a duty imposed by law, this Court has held that it cannot be maintained on a contract theory beyond the three-year period." *Id.* at 126-127. They type of legal duty to which this holding applies is one arising under negligence law, such as an innkeeper's duty to safeguard a guest against an assault. *Id.*

This case does not involve Comerica's liability for a duty imposed by law. Further, while we recognize that the three-year limitations period in MCL 600.5805(10) has been applied to conversion claims, *Tillman v. Great Lakes Truck Ctr., Inc.*, 277 Mich.App 47; 742 NW2d 622 (2007), we disagree with Comerica's argument that the essence of GM's cause of action is a conversion claim. "[C]onversion is a wrongful act of dominion over another person's property,

even including forgery of instruments." *Id.* at 49. Although the retention of a mistaken payment may involve a wrongful act of dominion, as discussed earlier, unjust enrichment is a cognizable equitable action that may be remedied by restitution. *Sentry Ins.*, 239 Mich.App at 452; see also *Wilson*, 463 Mich. at 441-442. "[T]he law will imply a contract to prevent unjust enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense." *Morris Pumps*, 273 Mich.App at 195.

Examining GM's complaint as a whole, the gravamen of the claim is not that GM suffered an injury to its property by making a mistaken payment. Rather, the claim is based on the injustice of having Comerica retain the benefit of the overpayments after it acquired knowledge that the payments were made by mistake. Because GM is not seeking damages for injury to property as required by MCL 600.5805(10), the trial court did not err by failing to apply the three-year limitations period in that statute. And considering Comerica's failure to show that the six-year limitations period in MCL 600.5813 is not otherwise applicable, we conclude that the trial court did not err in denying Comerica's motion for summary disposition under MCR 2.116(C)(7) with respect to the June 28, 2000, overpayments.

*7 Affirmed. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

All Citations

Not Reported in N.W.2d, 2010 WL 5174515

Footnotes

1 Even if were we to consider the arguments raised in Comerica's "renewed" motion for summary disposition filed on March 24, 2008 we would find no error. The argument that Comerica made when responding to GM's motion for partial summary disposition on August 3, 2007, was that it detrimentally relied on Hy-Lift's loan repayment to extend further credit to Hy-Lift. The trial court rejected the latter argument, given that Comerica had knowledge of the overpayments and "still proceeded to, to lend money that they were not damaged, that there was no reliance, ability [sic] to rely on this, on this overpayment." Regardless, viewing the evidence in a light most favorable to Comerica, Comerica benefited from the mistaken payments by reducing the amount of risk that it faced from the outstanding loan made to Hy-Lift. In addition, Comerica factored the mistaken payments into its formula for extending future credit to Hy-Lift, even after it discovered the overpayments during an August 2000 collateral review of Hy-Lift. Comerica concedes that it discovered the overpayments in August 2000.

Comerica's application of GM's overpayments to Hy-Lift's loan obligation and failure to take any corrective action after discovering the overpayments in August 2000, thus enabled Comerica to avoid financial loss. Essentially, given the lack of evidence that Hy-Lift had assets to cover the amount of GM's overpayments, the case comes down to two parties, Comerica and GM, only one of whom will suffer a loss in the amount of GM's overpayments. Were we to consider this issue, we would conclude that because Hy-Lift had no right to GM's overpayments, and such mistaken payments are treated as involuntary payments, *Wilson v. Newman*, 463 Mich. 435, 443; 617 NW2d 318 (2000) rather than an extension of credit by the payor to the payee, it follows that Comerica was unjustly enriched at GM's expense.

2 When interpreting a uniform act like the UCC, it is appropriate to consider cases decided in other jurisdictions where the UCC has been adopted. *Heritage Resources, Inc. v. Caterpillar Fin. Servs. Corp.*, 284 Mich.App 617, 632; 774 NW2d 332 (2009).

3 Comerica has not challenged the trial court's determination that, to the extent MCL 600.5805(10) does not apply, GM's action was timely filed within the six-year limitations period prescribed in MCL 600.5813.

End of Document

Exhibit C

2012 WL 2865781
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Doris L. GASKIN and Coretta J. Sisson, Plaintiff–Appellees,
v.
CITY OF JACKSON, Defendant–Appellant.

Docket No. 303245. | July 12, 2012.

Jackson Circuit Court; LC No. 10–001531–CZ.

Before: BECKERING, P.J., and FITZGERALD and STEPHENS, JJ.

Opinion

PER CURIAM.

*1 In this case involving plaintiffs Doris L. Gaskin and Coretta J. Sisson's claims of unreasonable use of groundwater, interference with the right to lateral and subjacent support, and an unconstitutional taking of private property, defendant City of Jackson appeals as of right the trial court's order denying defendant's motion for summary disposition under MCR 2.116(C)(7), (8), and (10). We affirm in part, reverse in part, and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case involves damage to homes owned by Gaskin ("the Gaskin property") and Sisson ("the Sisson property") in Jackson, Michigan, which plaintiffs allege was caused by defendant's operation of four water-utility wells in Sharp Park. The Gaskin and Sisson properties are approximately 1,161 feet and 950 feet from the closest well in Sharp Park, respectively.

Defendant owns and operates a water utility system that provides water services to portions of Blackman, Summit, and Leoni Townships. The system is comprised of various wells at different locations, including the four wells at Sharp Park. Defendant initiated the installation of the four wells at Sharp Park in 1991. Defendant hired Layne–Northern Company and C.J. Linck and Associates to determine whether Sharp Park was an appropriate place for the wells. An investigation conducted by C.J. Linck and Associates provided that the proposed pumping area would create an "area of influence" or "capture zone" extending approximately 11,000 feet to the northwest and 11,000 feet to the southwest. Furthermore, it projected interference by the pumpage "for other wells within a radius of 10,000 feet"; a "very conservative" plot indicated a 35 to 45 foot drawdown in groundwater elevation in the vicinity of plaintiffs' homes. After an investigation, C.J. Linck and Associates recommended that defendant proceed with the installation of the wells at Sharp Park. The wells were installed in 1992.

Sisson purchased the Sisson property in July 1995. Before the purchase, there were repairs made to the home's north wall. After the purchase, Sisson had to remove garbage and water "up to the knee" in the basement. Later, the home's north wall began caving in and had to be replaced. Sisson also noticed the following: foundation problems; holes forming in the basement floor and yard; and cracks in the basement floor, dining-room ceiling, household walls, kitchen counter tops, ceramic floor, and the driveway.

Also in the summer of 1995, the Millbens, who owned the Gaskin property at the time, began to notice cracks in the brick work and basement floor of their home. The cracks became worse in 1996. Steve Maranowski, president of Spartan Specialties LTD (Pressure Grouting Services), visited the Gaskin property and wrote a letter on December 6, 1996, to Karl Schelling of Schelling Construction Inc. Maranowski observed "cracks at the north and west walls as well as the basement floor." Maranowski opined, "The cracks and settlement are of a recent nature which concludes that the soil beneath the foundation has under gone a change allowing the subsoil to consolidate causing the building damage." Moreover, Maranowski wrote, "This consolidation of the subsoil could have been due to the recent dry period and/or lowering of the water table through community wells." On May 2, 1997, Schelling wrote the Millbens a letter stating that, after "a recent reinspection" of their property, "it is apparent that the problem is getting continually worse." Schelling opined, "This again reinforces my belief that the City of Jackson well field is the originating cause of the problem and that the soil in the area of settlement is continuing to dry out." In May 1997, the Millbens made a claim to defendant to repair the damages to the

Gaskin property and included correspondence from Spartan Specialties LTD and Schelling Construction Inc. with their claim. Defendant rejected the Millbens' claim, emphasizing both the absence of an analysis by an "engineer or other qualified person" to demonstrate a causal relationship and protection by "sovereign immunity."

*2 The Millbens sold the Gaskin property to Gaskin in November 1998 after disclosing to Gaskin that the corner of the home was "settling." Gaskin talked to a contractor, Matt Marian, who told her that other houses in the area had similar problems with "settling." After her purchase, Gaskin made repairs to the home's foundation. In May 2007, defendant's city officials inspected additional damages at the Gaskin property, including the following: foundation problems, sinking of the basement floor, off track doors and windows, detached floor baseboards, cracked bricks and walls, and sink holes in the ground. Gaskin received "no results" in getting defendant to accept responsibility. Gaskin engaged Robert Hayes, a certified professional geologist with GeoForensics, Inc, who conducted soil borings and told Gaskin that the damage to her home "was from the water being drawn by the city wells."On October 16, 2008, Gaskin sent a letter to defendant for a claim for damages to the Gaskin property. In June 2009, Gaskin submitted to defendant an analysis conducted by Robert Hayes, wherein Hayes concluded "that the damage to the Gaskin residence more likely than not is due to subsidence caused by pumping activities at Ella Sharp Park Well Field, which reduce the aquifer's potentiometric surface, causing the earth materials to consolidate and the foundation to subside."Later that month, defendant denied Gaskin's claim, opining that the claim was both meritless and barred by governmental immunity.

Plaintiffs sued defendant, alleging three counts: (I) Groundwater Claim; (II) Subjacent/Lateral Support Claim; and (III) Taking Claim. With respect to the groundwater claim, plaintiffs alleged that defendant interfered with their reasonable use of groundwater for "stability to their soils and structures thereon" by continuously, excessively, and unreasonably operating their wells. For their lateral—and subjacent-support claim, plaintiffs alleged that defendant "breached a common law and statutory duty to furnish sufficient lateral and subjacent support to Plaintiffs' lands and structures thereon" by excavating the four wells at Sharp Park. With respect to count III, plaintiffs alleged that their taking claim was on the basis of (1) defendant's conversion of groundwater to its own use without paying for it and (2) injury to private property where defendant abused its legitimate powers and the value of plaintiffs' property substantially declined. For each claim, plaintiffs requested declaratory relief, a writ of mandamus to compel defendant to initiate condemnation proceedings under the Uniform Condemnation Procedures Act ("UCPA"), MCL 213.51 *et seq.*, an injunction enjoining defendant from well-pumping activities that interfere with plaintiffs' reasonable use of the groundwater, and damages.

Defendant moved for summary disposition under MCR 2.116(C)(7), (8), and (10), arguing, among other things, that all of plaintiffs' claims were tort claims and, with respect to the taking claim, that plaintiffs had not established either a property right in groundwater to demonstrate a taking or the elements of inverse condemnation. Plaintiffs answered defendant's motion for summary disposition and also moved for partial summary disposition with respect to the taking claim under MCR 2.116(I)(2) and MCR 2.116(C)(10). After hearing oral arguments on defendant's motion, the trial court denied the motion in a written order, opining that summary disposition was inappropriate under MCR 2.116(C)(7), (8), and (10). The court did not address plaintiffs' motion.

II. JURISDICTION

*3 As an initial matter, plaintiffs contend that this Court does not have jurisdiction under MCR 7.203(A)(1) because the trial court's order denying defendant's motion for summary disposition is not a final order under MCR 7.202(6)(a)(v). We disagree.

This Court's jurisdiction is governed by statute and court rule; therefore, "whether this Court has jurisdiction is a question of law that this Court reviews de novo."*Chen v. Wayne State Univ.*, 284 Mich.App. 172, 191, 771 N.W.2d 820 (2009). Under MCR 7.203(A)(1), this "[C]ourt has jurisdiction of an appeal of right filed by an aggrieved party from ... [a] final judgment or final order of the circuit court ... as defined in MCR 7.202(6)...." Under MCR 7.202(6)(a), a "final judgment" or "final order" in a civil case includes the following:

> (i) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order,
>
> ***

> (v) an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116(C)(7) or an order denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity. [MCR 7.202(6)(a)(i), (v).]

In its order denying defendant's motion for summary disposition, the trial court correctly noted that defendant moved for summary disposition under MCR 2.116(C)(7), (8), and (10). The court properly articulated the standard of review for all three summary-disposition grounds. The court then analyzed defendant's motion in three separate sections: (1) Failure to State a Claim, (2) Governmental Immunity, and (3) Reasonable Use Balance Test. The court denied summary disposition on each ground.

We conclude that the trial court's order is not a "final order" under MCR 7.202(6)(a)(i) because it is not "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties." Rather, the order is properly viewed as denying governmental immunity to a governmental party under MCR 2.116(C)(7). See MCR 7202(6)(a)(v). Given the structure of the trial court's order, the trial court did not deny summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity as it did not address immunity in the final section of its order. The trial court obviously committed a clerical error when—after appropriately articulating the correct standards for summary disposition under MCR 2.116(C)(7) and (C)(8)—it denied defendant's motion for failure to state a claim under (C)(7) and for governmental immunity under (C)(8). Under MCR 7.216(A)(1) and (4), we amend the trial court's order to correctly state that defendant's motion for summary disposition on the basis of governmental immunity is denied under MCR 2.116(C)(7) (and that the motion for failure to state a claim is denied under MCR 2.116(C)(8)). Furthermore, we emphasize that

> *4 regardless of the specific basis of the trial court's ruling on a motion for summary disposition, whenever the effect is to deny a defendant's claim of immunity, the trial court's decision is, in fact, 'an order denying governmental immunity.' Logic dictates that such a determination be reviewable under MCR 7.203(A). [*Walsh v. Taylor*, 263 Mich.App. 618, 625, 689 N.W.2d 506, 512 (2004), quoting MCR 7.202(6)(a)(v).]

Accordingly, the trial court's order denying defendant's motion for summary disposition is a final order under MCR 7.202(6)(a)(v) because it denies governmental immunity under MCR 2.116(C)(7). This Court has jurisdiction under MCR 7.203(A)(1).

III. GOVERNMENTAL IMMUNITY

Defendant argues that plaintiffs' claims are tort claims barred by governmental immunity and, therefore, the trial court should have granted summary disposition in its favor. We agree in part.

We review de novo both the applicability of governmental immunity and a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *Roby v. Mount Clemens*, 274 Mich.App. 26, 28, 731 N.W.2d 494 (2006). "Under MCR 2.116(C)(7), the trial court must accept as true the contents of the complaint, unless they are contradicted by documentary evidence submitted by the moving party." *Id.* "A trial court may also consider the parties' pleadings, affidavits, depositions, admissions, and other documentary evidence filed to determine whether the defendant is entitled to immunity." *Id.*

"Under the [GTLA], a governmental agency is shielded from tort liability if it is engaged in the exercise or discharge of a governmental function." *Id.*; see also *Fane v. Detroit Library Comm.*, 465 Mich. 68, 74, 631 N.W.2d 678 (2001) ("Under M.C.L. § 691.1407(1), a government agency is generally immune from suit for actions undertaken in the performance of its governmental functions."). In this case, the parties do not dispute that defendant is a "governmental agency." And the parties agree that defendant is authorized by statute, city charter, and city ordinance to own and operate a water utility system and, thus, is engaging in a governmental function. Moreover, the parties do not dispute the inapplicability of exceptions to governmental immunity; rather, the parties disagree over whether plaintiffs' claims are tort claims under the GTLA.

Plaintiffs argue that governmental immunity does not apply to their claims because they request equitable relief for each individual claim. In *Hadfield v. Oakland Co. Drain*

Comm'r, 430 Mich. 139, 152 n. 5, 422 N.W.2d 205 (1988), overruled on other grounds *Pohutski v. Allen Park*, 465 Mich. 675, 641 N.W.2d 219 (2002), our Supreme Court stated that, "[g]enerally, we do not view actions seeking only equitable relief, such as abatement or injunction, as falling within the purview of governmental immunity." The decision in *Hadfield*, however, was a plurality opinion that is not binding on this Court. *Jackson Co. Drain Comm'r v. Village of Stockbridge*, 270 Mich.App. 273, 285, 717 N.W.2d 391 (2006); see also *Hadfield*, 465 Mich. at 144, 204, 631 N.W.2d 733.

*5 Later, in *Jackson Co.* this Court held that "[t]he plain language of [MCL 691.1407(1)] does not limit the immunity from tort liability to liability for damages." *Jackson Co.*, 270 Mich.App. at 284, 717 N.W.2d 391. The *Jackson Co* Court explained that

> governmental immunity is to be broadly construed, while exceptions to immunity are to be narrowly construed. To construe the statute as plaintiffs urge in the instant case [, i.e., that governmental immunity does not apply where plaintiffs' trespass-nuisance action seeks only equitable relief,] would be to construe governmental immunity narrowly. Moreover, such a construction would judicially impose a term into the statute that the Legislature did not provide, which is not permitted. *[Id.]*

However, after this Court's decision in *Jackson Co.* the Supreme Court in *Lash v. Traverse City*, 479 Mich. 180, 204–205, 735 N.W.2d 628 (2007), indicated that governmental immunity does not apply to claims seeking declaratory or injunctive relief. The plaintiff in *Lash* sued the defendant Traverse City for monetary damages, alleging that the city denied him employment because he did not meet the city's residency requirement and that the residency requirement violated MCL 15.602(2). *Lash*, 479 Mich. at 182–183, 735 N.W.2d 628. The Supreme Court held that the city's residency requirement violated MCL 15.602(2); however, the Court also held that nothing in MCL 15.602(2) permitted the plaintiff to maintain a private cause of action for damages against the city.[1] *Id.* at 183, 735 N.W.2d 628. In response to the plaintiff's contention that a private cause of action for damages was the only mechanism to enforce MCL 15.602(2), the Court opined that the plaintiff could have enforced the statute by seeking injunctive relief under MCR 3.310 or declaratory relief under MCR 2.605(A)(1). *Id.* at 196, 735 N.W.2d 628.

The Supreme Court's decision in *Lash*, particularly its emphasis on the plaintiff's ability to enforce MCL 15.602 through declaratory or injunctive relief, demonstrates that governmental immunity does not apply to claims that request declaratory or injunctive relief. While the Court's discussion of enforcing MCL 15.602 through equitable relief was not necessary to its decision that the plaintiff could not maintain a private cause of action for monetary damages against the city, its equitable-relief discussion was not dicta and is binding on this Court; "when a court of last resort intentionally takes up, discusses and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum but is a judicial act of the court which it will thereafter recognize as a binding decision." *Carr v. City of Lansing*, 259 Mich.App. 376, 384, 674 N.W.2d 168 (2003). Here, the *Lash* Court intentionally took up the equitable-relief issue, and the issue was germane to the controversy in *Lash* because the Court addressed the issue in response to the plaintiff's contention that a private cause of action for monetary damages was the only mechanism to enforce MCL 15.602(2). Therefore, *Lash* must be read as implicitly overruling *Jackson Co.* and this Court must follow *Lash*. See *Id.*; *Felsner v. McDonald Rent-A-Car, Inc.*, 193 Mich.App. 565, 569, 484 N.W.2d 408 (1992) ("Stare decisis dictates that a decision of the majority of the justices of our Supreme Court is binding upon lower courts."). Moreover, it is clear that an action for mandamus is an equitable action, not a tort action, and, thus, falls outside the provisions of governmental tort immunity. See *Mercer v. City of Lansing*, 274 Mich.App. 329, 332–334, 733 N.W.2d 89 (2007); *Wayne Co. Sheriff v. Wayne Co. Bd. of Comm'rs*, 196 Mich.App. 498, 510, 494 N.W.2d 14 (1992).

*6 Therefore, plaintiffs' claims are not barred by governmental immunity to the extent that they seek equitable relief, i.e., a declaratory judgment, injunction, or writ of mandamus.

In all three claims, plaintiffs request damages in addition to equitable relief. To the extent that these claims are tort claims seeking damages within the meaning of the GTLA, they are barred. See *Lee v. Macomb Co. Bd. of Comm'rs*, 235 Mich.App. 323, 334–336, 597 N.W.2d 545 (1999) (concluding that trial court properly dismissed tort claims

seeking damages for negligence but improperly dismissed counts seeking mandamus), rev'd on other grounds *Lee v. Macomb Co. Bd. of Comm'rs*, 464 Mich. 726, 741, 629 N.W.2d 900 (2001) (reversing on the basis of lack of standing to seek mandamus); see also *Mercer*, 274 Mich.App. at 331–332 & n. 4, 733 N.W.2d 89.

A common-law lateral—and subjacent-support claim is considered an allegation on the basis of negligence or trespass. See *Tillson v. Consumers Power Co.*, 269 Mich. 53, 56, 256 N.W.2d 801 (1934) ("[Plaintiff] asserts a right of recovery ... by reason of defendants' common-law liability arising from alleged negligence...."); *Aristas v. Detroit & Canada Tunnel Co.*, 258 Mich. 579, 581–582, 587, 242 N.W. 757 (1932) (explaining that the theory of common-law liability for withdrawal of lateral support sounds in negligence); *Gildersleeve v. Hammond*, 109 Mich. 431, 438–439, 67 N.W. 519 (1896) (holding that a landowner who has the right to excavate close to a boundary line must take "reasonable precautions" to prevent his neighbor's soil from falling); *Buskirk v. Strickland*, 47 Mich. 389, 390–392, 11 N.W. 210 (1882) (action for damages on the basis of removal of lateral support is an action "on the case" or for trespass). And the statutory claim arises from the imposition of a duty by statute:

> It shall be the duty of every person, partnership or corporation who excavate upon land owned or occupied by them to a depth exceeding 12 feet below the established grade of a street or highway upon which such land abuts or, if there is no such established grade, below the surface of the adjoining land, to furnish sufficient lateral and subjacent support to the adjoining land to protect said land and all structures thereon from injury due to the removed material in its natural state, or due to the disturbance of other existing conditions caused by such excavation. [MCL 554.251.]

Therefore, our Supreme Court has categorized a common-law and statutory lateral—and subjacent-support claim as a "tort action." *Tillson*, 269 Mich. at 56, 256 N.W. 801.

With respect to groundwater-interference claims, this Court has traditionally looked to groundwater-rights principles expressed in the Restatement of Torts. See, e.g., *Mich Citizens for Water Conservation v. Nestle Waters North America, Inc.*, 269 Mich.App. 25, 68–74 & n. 46, 709 N.W.2d 174 (2005) (looking to 4 Restatement Torts, 2d, § 850A for guidance in a groundwater claim), rev'd in part on other grounds *Mich Citizens for Water Conservation v. Nestle Waters North America, Inc.*, 479 Mich. 280, 284–285, 737 N.W.2d 447 (2007); *Maerz v. United States Steel Corp.*, 116 Mich.App. 710, 720, 323 N.W.2d 524 (1982) (holding that Restatement Torts, 2d, § 858, p 258, which addresses liability for use of groundwater, should be followed in Michigan); *Hart v. D'Agostini*, 7 Mich.App. 319, 322, 151 N.W.2d 826 (1967) ("The liability for interference with the subterranean water supply of a neighbor has been expressed, depending upon whether the causative activity (1) if intentional, was unreasonable, or (2) if unintentional, was negligent. See Restatement, Torts s 822, at p. 226, 151 N.W.2d 826...."). In applying a reasonable-use balancing test to a groundwater claim, this Court has looked to Restatement Torts, 2d, § 850A as an aid to understanding the role of the factors to be balanced. See *Nestle*, 269 Mich.App. at 68–74 & n. 46, 709 N.W.2d 174. Chapter 41 of the Second Restatement of Torts addresses interference with the use of water. The Second Restatement of Torts states the following as an introductory note to Chapter 41:

> *7 Although the interests protected by the rules stated in this Chapter are property rights arising out of the ownership and possession of land, an interference with a right to the use of water logically and analytically belongs in the field of tort liability. An unprivileged interference is a tort, although, like a trespass or nuisance, it is a tort directed at an interest in property. [4 Restatement Torts, 2d, introductory note to §§ 841 to 863, p 182.]

"A 'tort' is broadly defined as 'a civil wrong for which a remedy may be obtained.' " *Tate v. Grand Rapids*, 256 Mich.App. 656, 660, 671 N.W.2d 84 (2003) (citation omitted). "The GTLA unambiguously grants immunity from *all* tort liability, i.e., all civil wrongs for which legal responsibility is recognized, regardless of how the legal responsibility is determined, except as otherwise provided in the GTLA." *Id.* (emphasis in original). Plaintiffs' claim for groundwater interference is a tort claim because it is a claim for a civil wrong—interference with plaintiffs' right to reasonably use groundwater—for which legal responsibility

is determined through the reasonable-use balancing test to the end of obtaining a remedy. Therefore, we conclude that plaintiffs' groundwater-interference claim is a tort claim.

Accordingly, to the extent that plaintiffs' groundwater-interference claim and common-law and statutory lateral- and subjacent-support claim seek compensatory damages (as opposed to equitable relief), we conclude that they are barred by the GTLA. The trial court erred when it did not grant summary disposition in favor of defendant on this basis.

With respect to plaintiffs' taking claim, plaintiffs assert two theories: (1) defendant's conversion of groundwater and (2) injury to plaintiffs' property caused by public improvement or public activity. Defendant concedes that "[g]overnmental immunity is not applicable to a takings claim."See generally *Electro–Tech, Inc. v. HF Campbell Co.*, 433 Mich. 57, 91 n. 38, 445 N.W.2d 61 (1989) (stating that the immunity doctrine does not insulate the government from immunity in taking claims). Defendant, however, insists that plaintiffs' taking claim is actually a tort claim disguised as a taking claim. We disagree.

First, under their groundwater-conversion theory, plaintiffs allege that defendant unreasonably interfered with their groundwater rights to serve a public use by removing groundwater beneath their properties for distribution through the water utility system. Plaintiffs allege that defendant conducted a feasibility study that showed that the wells would adversely impact neighboring properties but, nonetheless, constructed the wells and put them into operation. Plaintiffs also allege that defendant failed to conduct a study on how its wells would affect the stability of surrounding soils and that defendant continued its operation of the wells even after Gaskin presented evidence to defendant that the wells caused the damage to her property.

[*8] Plaintiffs frame this theory of a taking in reliance on *Jones v. East Lansing–Meridian Water & Sewer Auth.*, 98 Mich.App. 104, 296 N.W.2d 202 (1980). In *Jones*, the plaintiffs began to experience loss of water, lower water pressure, and other well problems after the defendant Water and Sewer Authority constructed and placed wells into operation in the vicinity of the plaintiffs' properties. *Jones*, 98 Mich.App. at 105–106, 296 N.W.2d 202. Before the construction, "[n]o inquiry was conducted into the extent [the] Authority wells would interfere with private wells in the area because of the apparent belief that some interference would be caused no matter where the Authority wells were located."*Id.* at 106, 296 N.W.2d 202. After the plaintiffs reported their concerns in an attempt to alleviate the wells' impact on their property, the defendant contracted to have a study completed; the study showed that "certain of the Authority's wells created an excessive drawdown (depletion) when operated together and that the problems with the private wells in the area were directly caused by the Authority's well operation."*Id.* at 106–107, 296 N.W.2d 202. Notwithstanding the study, the defendant continued to pump the wells identified as creating the greatest interference, and the plaintiffs sued the defendant, alleging a nuisance, a taking, and an unreasonable interference with groundwater rights. *Id.* at 107, 296 N.W.2d 202. On appeal, this Court determined that the defendant unreasonably interfered with the plaintiffs' subterranean water rights. *Id.* at 109, 296 N.W.2d 202. This Court emphasized that the defendant was on notice before putting its wells into operation that its wells would cause interference with private wells. *Id.* Moreover, the Court emphasized that there were alternatives to drilling the wells, but the defendant failed to study the alternatives. *Id.* Finally, this Court concluded that the plaintiffs were entitled to recover just compensation for a taking under the United States and Michigan Constitutions. *Id.* at 110–111, 296 N.W.2d 202. The Court noted that to establish a taking "it is sufficient that ... private property has been impressed into serving a public use."*Id.* The Court concluded, "Defendants did impress plaintiffs' private property into serving a public use by unreasonably interfering with plaintiffs' subterranean water rights."*Id.* Given the substantial similarity between *Jones* and plaintiffs' factual allegations, plaintiffs' allegation of a taking on this basis is not a mislabeled tort claim.

Second, plaintiffs allege a taking on the basis of damage to private property for which plaintiffs must show the following: (1) defendant's actions substantially contributed to the decline in value of plaintiffs' property and (2) defendant abused its legitimate powers through affirmative actions directly aimed at plaintiffs' property. *Hinojosa v. Dep't of Natural Resources*, 263 Mich.App. 537, 548, 688 N.W.2d 550 (2004). Here, plaintiffs allege that defendant's "well pumping activities lowered the groundwater elevation beneath Plaintiffs' lands, [which] significantly and negatively impacted the stability of the soil which caused or substantially contributed to permanent, serious damages, diminution in value, and loss of use and enjoyment of the property."Moreover, plaintiffs allege that defendant abused both its legitimate powers and eminent domain powers when it (1) failed to conduct studies to determine the wells' effect on the stability of the surrounding soils after receiving notice that the wells would

have adverse effects on property in the vicinity, (2) failed to take corrective action when placed on notice by Gaskin that its wells were causing serious damage, (3) excessively and unreasonably conducted its well pumping activities, (4) knowingly took large quantities of groundwater from beneath plaintiffs' lands in complete disregard of their property rights, (5) failed to disclose relevant information concerning the negative effects of its well pumping, (6) refused to respond to documents attributing the damage to plaintiffs' property to defendant's well pumping, and (7) engaged in deceptive and dilatory conduct intended to discourage plaintiffs from further pursuing defendants. Given these factual allegations, plaintiffs' taking claim on this basis is not a mislabeled tort claim.

*9 Accordingly, we conclude that plaintiffs' taking claim is not a tort claim in disguise. The claim is not barred by the GTLA.[2] See *Electro-Tech*, 433 Mich. at 91 n. 38, 445 N.W.2d 61.

IV. ISSUES NOT PROPERLY BEFORE THIS COURT

Defendant's final contention is that there is no evidence to establish a taking, i.e., that defendant abused its legitimate powers in actions directly aimed at plaintiffs' properties that substantially caused a decline in value of the property. However, whether there is sufficient evidence of a taking to withstand summary disposition is beyond the scope of this Court's review; "in an appeal by right from an order denying a defendant's claim of governmental immunity, ... this Court does not have the authority to consider issues beyond the portion of the trial court's order denying the defendant's claim of governmental immunity." *Pierce v. City of Lansing*, 265 Mich.App. 174, 182, 694 N.W.2d 65 (2005); see also MCR 7.203(A) ("An appeal from an order described in MCR 7.202(6)(a)(iii)-(v) is limited to the portion of the order with respect to which there is an appeal of right."). Therefore, we do not consider this issue.

Finally, plaintiffs argue that they are entitled to partial summary disposition on their taking-by-damage claim because defendant did not meet its burden of production under MCR 2.116(G)(4) as it "failed to submit documents to show the City wells did not cause the damage." This issue is also not appropriately before this Court. Our Supreme Court has made clear:

> In the absence of a cross appeal, errors claimed to be prejudicial to appellee cannot be considered nor may appellee have an enlargement of relief. However, an appellee, who has taken no cross appeal, may, nevertheless, urge in support of the judgment in his favor reasons rejected by the trial court. A correct result reached by the trial court will be affirmed on error, even though arrived at by that court on reasoning which we deem erroneous. [*Pontiac Twp. v. Featherstone*, 319 Mich. 382, 390–91, 29 N.W.2d 898 (1947) (internal citations omitted); see also *McCardel v. Smolen*, 404 Mich. 89, 94–95 & n. 6, 273 N.W.2d 3 (1978).]

Here, plaintiffs are not merely seeking either to have the trial court's decision affirmed or alternative grounds for affirmation; rather, they seek to obtain a decision more favorable to them than what the trial court rendered without doing so in a cross-appeal. This is improper. See *Featherstone*, 319 Mich. at 390–391, 29 N.W.2d 898; *Vanslembrouck v. Halperin*, 277 Mich.App. 558, 566, 747 N.W.2d 311 (2008) ("Accordingly, defendants, who raised this issue below and are seeking only to have the trial court's decision affirmed (rather than to obtain a decision more favorable than was rendered by the lower court), were not required to file a cross-appeal in order to have this issue properly before the Court."). The trial court did not address or decide plaintiffs' motion for summary disposition; nor will this Court.

*10 Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

All Citations

Not Reported in N.W.2d, 2012 WL 2865781

Footnotes

1 While the Court recognized that a private cause of action for damages may be inferred from statutes that do not expressly provide for such a cause of action, the Court emphasized that a private cause of action cannot be implied against a governmental entity in contravention of the broad scope of governmental immunity. *Lash*, 479 Mich. at 194, 735 N.W.2d 628.

2 We note and reject defendant's reliance on *Faulknor v. Dalton Twp*, unpublished opinion per curiam of the Court of Appeals, issued May 21, 2009 (Docket No. 284340), 2009 WL 1440758, for the proposition that plaintiffs' taking claim is a disguised tort claim. First, *Faulknor* is not binding on this Court. See *Paris Meadows, LLC v. City of Kentwood*, 287 Mich.App. 138, 145 n. 3, 783 N.W.2d 133 (2010). Second, we do not find *Faulknor* persuasive as the present case is distinguishable. In *Faulknor*, the plaintiff's tavern was allegedly accidently damaged by sewer-line installation under a road after the township decided not to install the sewer line underneath the plaintiff's property. *Faulknor*, unpub op at 2. The *Faulknor* Court opined that there was no evidence that defendant abused its legitimate powers through affirmative action directly aimed at plaintiffs' property, emphasizing the township's efforts to obtain an easement and install the sewer line underneath the roadway instead of the plaintiff's property and the record evidence demonstrating that the damage to the tavern had "very likely" existed "for many years" before the sewer-line installation. *Id.* at 2–4, 783 N.W.2d 133. The same cannot be said in the present case. Plaintiffs allege and the documentary evidence indicates that defendant had notice of the negative impact of operating the wells before the wells were constructed but, nevertheless, went forward with the well construction at Sharp Park. There is evidence documenting the damage to plaintiffs' properties, the properties' close proximity to the wells, and the damages' temporal proximity to defendant's initiation of well pumping at Sharp Park. There is also documentary evidence that the Millbens, plaintiffs, Maranowski, Schelling, and Hayes were of the opinion that the wells were damaging plaintiffs' properties and that defendant was aware of these opinions but, nonetheless, continued to operate the wells.

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EXHIBIT 8

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

GENESEE COUNTY DRAIN COMMISSIONER,
JEFFREY WRIGHT,

Plaintiff,

-vs-

GENESEE COUNTY,

Defendant.

Case no. 11-97012 CK
Hon. Geoffrey L. Neithercut

HENNEKE, MCKONE, FRAIM & DAWES PC
Scott R. Fraim P35669
Charles R. McCone P24260
Attorneys for Plaintiff
2377 S. Linden Road, Suite B
Flint, MI 48532
810-733-2050

PLUNKETT COONEY
H. William Reising P19343
Attorney for Defendant
111 E. Court Street, Suite 1B
Flint, MI 48502
810-342-7001

REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY DISPOSITION

Plaintiff's claim for unjust enrichment seeks to impose tort liability and therefore is barred by governmental immunity. Plaintiff's claim is also unsustainable because it is deficiently pled. Summary disposition of this claim is warranted as a matter of law.

Plaintiff concedes that, under the authority of *In re Bradley Estate*, 494 Mich. 367 (2013), all non-contractual remedies of compensatory damages are barred by governmental immunity. (Pl.'s Resp. Br., filed with this Court, p. 8). *In re Bradley* expressly held that the "tort liability" contemplated in the Governmental Tort Liability Act is "all legal responsibility arising from a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages." *Id.* at 386. This definition encompasses

more than those claims that were traditionally thought of as "torts." It was held to include contempt sanctions in *In re Bradley*, and it includes Plaintiff's claim of unjust enrichment.

The Michigan Supreme Court outlined the factors to be considered in making the determination of whether a claim constitutes tort liability. The Court explained:

> Courts considering whether a claim involves tort liability should first focus on the nature of the duty that gives rise to the claim. If the wrong alleged is premised on a breach of a contractual duty, then no tort has occurred, and the GTLA is inapplicable. However, **if the wrong is not premised on a breach of a contractual duty, but rather is premised on some other civil wrong, i.e., some other breach of a legal duty, then the GTLA might apply** to bar the claim. In that instance, the court must further consider the nature of the liability the claim seeks to impose. **If the action permits an award of damages to a private party as compensation for an injury caused by the noncontractual civil wrong, then the action, no matter how it is labeled, seeks to impose tort liability** and the GTLA is applicable. *Id.* at 389 (emphasis added).

These factors establish that Plaintiff's unjust enrichment claim is a claim of tort liability. Unjust enrichment claims are not dependent on the existence of contractual duties, but other legal obligations. *Kammer Asphalt Paving Co. v. E. China Twp. Sch.*, 443 Mich. 176, 185 (1993) (finding the doctrine applicable "[e]ven though no contract may exist between two parties"). Indeed, unjust enrichment is wholly unavailable as a remedy where a contract exists between the parties. *Id.* at 186 ("Because this doctrine vitiates normal contract principles, the courts employ the fiction with caution and will never permit it in cases where contracts, implied in fact, must be established"); *King v. Ford Motor Credit Co.*, 257 Mich. App. 303, 327 (2003) ("a contract will not be implied under the doctrine of unjust enrichment where a written agreement governs the parties' transaction.").

Plaintiff's argument that unjust enrichment is an implied contract and therefore seeks contractual damages is not supported by Michigan law. "A contract implied in law is not a contract at all but an obligation imposed by law to do justice even though it is

clear that no promise was ever made or intended." *Matter of Estate of Lewis*, 168 Mich. App. 70, 74 (1988) (emphasis added). An unjust enrichment claim does not seek to remedy any contractual breach, but a breach of an alleged legal duty independent of any contract. As earlier stated, the doctrine is inapplicable in the face of a contractual duty. Plaintiff's argument therefore fails.[1]

Plaintiff's unjust enrichment claim is not, and cannot be, premised on any contractual duty owed by Defendant. Plaintiff does not identify any duty arising under contract with respect to this claim. (Pl.'s 2d Am. Compl., filed with this Court). Plaintiff seeks damages, not for any breach of a contractual duty, but for an alleged breach of a legal duty arising in justice and equity[2] due to Defendant's alleged "wrongful" conduct. (Pl.'s 2d Am. Compl., ¶ 43 & 45). Further, Plaintiff is not requesting an injunction or mandamus, but monetary damages. (Pl.'s 2d Am. Compl., p. 7). This is the essence of tort liability as defined in *In re Bradley*—a claim for "compensation for an injury caused by the [alleged] noncontractual civil wrong[.]" *In Re Bradley, supra* at 389. Plaintiff's claim is one of tort liability and, as such, it is barred governmental immunity.[3]

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[1] If this were true, Plaintiff's claim would nonetheless be subject to dismissal, because it is duplicative of his breach of contract claim. Summary disposition is thus proper even under Plaintiff's theory, which does not comport with the applicable case law.

[2] Unjust enrichment is defined as the unjust retention of "money or benefits which in justice and equity belong to another." *Tkachik v. Mandeville*, 487 Mich. 38, 47-48 (2010) (quoting in part *McCreary v. Shields*, 333 Mich. 290 (1952).

[3] This is particularly true given the broad nature of governmental immunity and the caution with which courts apply the doctrine of unjust enrichment. *Nawrocki v. Macomb County Rd Comm'n*, 463 Mich. 143, 158 (2000) ("the immunity conferred on governmental agencies is broad, and the statutory exceptions are to be narrowly construed.") (emphasis in original); *Kammer Asphalt Paving Co., supra.*

Plaintiff's claim would fail, regardless, because Plaintiff has not identified a benefit that Defendant unjustly received from Plaintiff to his detriment. Unlike the party in *General Motors* (Pl.'s Ex. C), Plaintiff does not claim to have made any payments by mistake. Plaintiff was told the amount of the premiums (Pl.'s 2d Am. Compl., ¶ 12), agreed to and paid that amount (Pl.'s 2d Am. Compl., ¶ 13 & 16), and received the benefit of insurance coverage for its employees (Pl.'s 2d Am. Compl., ¶ 11). The money Plaintiff seeks to recover was not received from Plaintiff, but from Blue Cross. (Pl.'s 2d Am. Compl., ¶ 25-26). Defendant did not receive a benefit from Plaintiff, nor did Plaintiff pay premiums to its detriment. Plaintiff's unjust enrichment claim therefore fails on its face. Defendant is entitled to summary disposition of this claim.

Respectfully submitted,

PLUNKETT COONEY

Dated: 12/8/15

H. William Reising (P19343)
Rhonda R. Stowers (P64083)
Attorneys for Defendant
(810) 342-7001

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on Dec. 8, 20 15

By: ☒ U.S. Mail ☐ FAX
☐ Hand Delivered ☐ Overnight Courier
☐ Certified Mail ☐ Other

Signature

EXHIBIT 9

STATE OF MICHIGAN
IN THE 7TH CIRCUIT COURT
COUNTY OF GENESEE

GENESEE COUNTY DRAIN COMMISSIONER, JEFFREY WRIGHT, Plaintiff, v GENESEE COUNTY, a Michigan municipal corporation, Defendant.	Case No. 11-97012-CK Hon. Geoffrey L. Neithercut ORDER

HENNEKE, FRAIM & DAWES, P.C. By: Scott R. Fraim (P35669) By: Brandon S. Fraim (P76350) Attorneys for Plaintiffs 2377 S. Linden Rd., Ste. B Flint, MI 48532 (810) 733-2050	PLUNKETT COONEY By: H. William Reising (P19343) Attorneys for Defendant 111 E. Court Street, Suite 1B Flint, MI 48502 (810) 342-7001

ORDER DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY DISPOSITION

At a session of the court held on December 14, 2015

PRESENT: Hon. Geoffrey L. Neithercut
Circuit Court Judge

This matter having come before this Court on Defendant's Motion for Partial Summary Disposition, and the Court having reviewed Briefs filed by the parties, having heard oral argument from counsel, and being otherwise fully advised in the premises:

IT IS HEREBY ORDERED: that, for the reasons set forth on the record, Defendant's Motion for Partial Summary Disposition requesting dismissal of Plaintiff's Unjust Enrichment Claim is denied.

APPROVED AS TO FORM:

Scott R. Fraim (P35669)
Attorney for Plaintiffs
Dated: 12-23-15

H. William Reising (P19343)
Attorney for Defendants
Dated: 12-23-15

Honorable Geoffrey L. Neithercut
Circuit Court Judge

Date: 12-28-15

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EXHIBIT 10

2017 WL 3642644
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Larry SHEARS and Margaret Fralick, Plaintiffs–Appellees,
v.
Douglas BINGAMAN, Individually and as City of Flint Treasurer, Darnell Earley, Individually and as City of Flint Emergency Manager, and City of Flint, Defendants–Appellants.

No. 329776
|
August 24, 2017

Genesee Circuit Court, LC No. 14–103476–CZ

Before: O'Brien, P.J., and Servitto and Stephens, JJ.

Opinion

Per Curiam.

*1 Douglas Bingaman ("Mr. Bingaman"), Darnell Earley ("Mr. Earley"), and the City of Flint ("the City") (referred to collectively as "defendants") appeal as of right the circuit court's October 15, 2015 order on the parties' motions for summary disposition, which denied in part defendants' motion for summary disposition. We reverse in part and remand for the entry of an order granting summary disposition in defendants' favor.

The named plaintiffs in this class action, Larry Shears ("Mr. Shears") and Margaret Fralick ("Ms. Fralick"), filed this lawsuit against defendants, challenging defendants' decisions to increase water and sewer rates by 35 percent and to increase a readiness-to-serve charge effective September 16, 2011. The complaint included the following six counts:

[ ]COUNT I—42.U.S.C. § 1983

VIOLATION OF MCL § 123.141(3)

69. Plaintiffs restate and reallege each and every allegation set forth in all previous paragraphs and incorporate them by reference herein.

70. MCL § 123.141(3), required Flint, a wholesale customer of the city of Detroit Water Supply Department, to provide water at a price equal to the actual cost of providing water service to Plaintiffs as retail customers of Flint. This statutory entitlement to water at this price created a property interest for Flint's retail customers under the laws of the State of Michigan.

71. Flint's practice, policy, and custom of charging and collecting from its retail water customers increased water rates from September 16, 2011 to the end of its wholesale Detroit water purchase contract on or about April 30, 2014, that were in excess of the actual cost of providing the water that it purchased from the Detroit Water Supply Department, was in violation of MCL § 123.141(3) and deprived its retail water customers of their property interests in water charges that comport with state law, without just compensation and without due process of law, in violation of the Fourteenth Amendment of the United States Constitution and Article I § 17 of the Michigan Constitution.

COUNT II—42.U.S.C. § 1983

UNCONSTITUTIONAL DEPRIVATION OF PROPERT[Y] WITHOUT DUE PROCESS—VIOLATION OF FLINT CHARTER § 46–52(b)(1)

72. Plaintiffs restate and reallege each and every allegation set forth in all previous paragraphs and incorporate them herein by reference.

73. Flint ordinance 46—52(b)(1) required FLINT to keep on file in Appendix A of the Flint City Code, with the City Clerk, an authorizing resolution of the Flint City Council, which established how its water readiness to serve charge was calculated for its retail residential, small business, and industrial water customers with and without remote water meters.

74. Flint's practice, policy, and custom of collecting water readiness to serve charges from its retail residential, small business, and industrial water customers with and without remote water meters between September 16, 2011 and the date hereof, is in violation of its Ordinance 46—52 (b)(1) and

deprived its retail residential, small business, and industrial water customers with and without remote water meters water customers of their property interests in validly computed/calculated water readiness to serve charges that comport with Flint ordinances, without due process of law, or just compensation, in violation of the Fourteenth Amendment of the United States Constitution and Article I § 17 of the Michigan Constitution.

*2 COUNT III—42.U.S.C. § 1983

UNCONSTITUTIONAL DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS— VIOLATION OF FLINT CHARTER § 46–52.1

75. Plaintiffs restate and reallege each and every allegation set forth in all previous paragraphs and incorporate them herein by reference.

76. At all times relevant hereto Flint ordinance 46–52.1, required that water and sewer rates be calculated and transmitted on or before April 15th to the Mayor and City Council for the purpose of pricing and calculating all bills for the forthcoming 12 months, beginning July 1 of that year, thereby creating a property interest for its retail water and sewer customers to have their water and sewer rates calculated and collected in conformity with Flint's ordinance 46–52.1, created an entitlement for those retail water and sewer customers to be charged a specific price for water and sewer services beginning July 1 of each year.

77. Flint's practice, policy, and custom of collecting the 35% increased water and sewer rates from its retail customers between September 16, 2011 and July 1, 2012 deprived Plaintiffs of their property interests in water and sewer charges that were implemented in conformity with Flint ordinances, by collecting more money, then it was legally entitled to collect, at a time not authorized by Flint ordinance for retail water and sewer rates, without due process of law or just compensation, in violation of the Fourteenth Amendment of the United States Constitution and Article I § 17 of the Michigan Constitution.

COUNT IV—42.U.S.C. § 1983

UNCONSTITUTIONAL DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS— VIOLATION OF FLINT CHARTER § 46–52.1(b)

78. Plaintiffs restate and reallege each and every allegation set forth in all previous paragraphs and incorporate them herein by reference.

79. At all times relevant hereto Flint ordinance 46–52.1(b) required that water rates be limited to an 8% annual adjustment.

80. Flint's practice, policy, and custom of collecting the 12.5% water rate increase from its retail customers between July 1, 2012 and the date hereof, deprived Plaintiffs of their property interests in water rate charges that comport with FLINT ordinances by collecting from its retail water customers more money then it was legally entitled to collect for annual retail water increases, without due process of law or just compensation, in violation of the Fourteenth Amendment of the United States Constitution and Article I § 17 of the Michigan Constitution.

COUNT V

CLAIMS FOR REFUNDS OF ILLEGALLY COLLECTED INCREASED WATER AND SEWER RATES AND INCREASED READINESS TO SERVE CHARGES

81. Plaintiffs restate and reallege each and every allegation set forth in all previous paragraphs and incorporate them herein by reference.

82. Flint has collected a 35 % illegal rate increase and increased readiness to serve charge between September 16, 2011 and July 1, 2012 from customers of Flint's water and sewer serves department.

83. The actual amount can be readily identified from the financial records of Flint.

*3 84. Flint should be ordered to refund to each and every one of its water and sewer customers the illegal 35 % rate increase/service charge amounts that said customers have paid to Flint between September 16, 2011 and July 1, 2012.

COUNT VI

CLAIMS FOR DECLARATORY RELIEF AND MONETARY DAMAGES

85. Plaintiffs restate and reallege each and every allegation set forth in all previous paragraphs and incorporate them herein by reference.

86. Many of Flint's customers have been unable or unwilling to pay the illegal rate increases since September 16, 2011 and have had their water service disconnected by Flint.

87. Flint should be enjoined from further disconnections based upon the illegal rate and service charge increases.

88. Flint should be required to pay monetary damages to the customers who have had their water service disconnected due to their inability or unwillingness to pay the illegal water and sewer rate increases implemented on September 16, 2011.

Eventually, the parties exchanged motions for summary disposition, and defendants' motion for summary disposition relied, in part, on their assertion that governmental immunity barred all of plaintiffs' claims as set forth in the complaint and quoted above. The circuit court agreed in part, explaining, in full, as follows:

> The Court agrees with Defendants that the ordinances that they clearly violated do not create a private cause of action to recover money damages; so to the extent that Plaintiffs have alleged claims for money damages based on ordinance violations, this Court cannot grant relief on those claims because they do not exist. And, as such, the Defendants are entitled to summary disposition on those specific claims pursuant to MCR 2.116(C) (8) because they are entitled to judgment as a matter of law.
>
> However, to the extent that Plaintiffs' claims against Defendant regarding the water and sewer rates and the service charge are based on a theory of unjust enrichment, since unjust enrichment is a valid, equitable claim, Plaintiffs have stated a claim on which this Court may grant relief; so Defendants are not entitled to summary disposition of any unjust enrichment claims pursuant to MCR 2.116(C) (8) because they are not entitled to judgment as a matter of law.
>
> Because a claim of unjust enrichment is an equitable claim that sounds in contract, not in tort, Defendants are not entitled to immunity from these claims under the GTLA. As such, Defendants are not entitled to summary disposition on any claims that sound in contract under MCR 2.116(C) (7), because they are not entitled to judgment as a matter of law.
>
> Finally, and although it seems on the surface that charging and collecting a thirty-five percent increase in water and sewer rates and a service charge certainly is unjust when those charges were collected by Defendants while they were clearly not complying with their own ordinances, the Court cannot decide the issue of Defendants' potential liability as a matter of law. A party's legal arguments concerning unjust enrichment claims have not been fully fleshed out. In fact, Defendants have not even addressed the issue of unjust enrichment and Plaintiffs have merely stated that they have alleged their—that claim.
>
> After conducting its own research on unjust enrichment, it appears to the Court that the resolution of this claim is a highly fact-intensive endeavor. As such, the Court is not in a position to grant either party's motion for summary disposition under (C) (10) because the Court cannot rule as a matter of law on the merits of Plaintiffs' unjust enrichment claims. To the extent that Plaintiffs seek relief for water and sewer rates and service—and the service charge under the theory of unjust enrichment, they have stated a claim on which the Court may grant relief. Because the claim of unjust enrichment sounds in contract, the Defendants are not immune from this claim under the GTLA.
>
> *4 Finally, because unjust enrichment is a highly fact-intensive question, this Court cannot decide Defendants' liability as a matter of law at this point in time. Plaintiffs' motion for summary disposition as to liability should be denied. Defendants' motion for summary disposition under (C) (8) should be granted to the extent that Plaintiffs' claims seek money damages for violating City ordinances. In all other respects, Defendants' motions should be denied.

Defendants appealed as of right this decision, MCR 7.202(6)(a)(v), arguing, in pertinent part, that summary disposition pursuant to MCR 2.116(C)(7) was appropriate with respect to all six counts as set forth in plaintiffs' complaint. We agree.

> This Court reviews de novo the trial court's decision on a motion for summary disposition under MCR 2.116(C) (7). *Rowland v Washtenaw Co Rd Comm*, 477 Mich.

197, 202; 731 N.W.2d 41 (2007). A defendant is entitled to summary disposition under MCR 2.116(C)(7) if the plaintiff's claims are barred because of immunity granted by law. *Id.* at 466. If reasonable minds could not differ on the legal effects of the facts, it is a question of law whether governmental immunity bars a plaintiff's claim. *Snead v John Carlo, Inc*, 294 Mich. App. 343, 354; 813 N.W.2d 294 (2011).

We review de novo the applicability of governmental immunity and the statutory exceptions to governmental immunity. *Moraccini v City of Sterling Hts*, 296 Mich. App. 387, 391; 822 N.W.2d 799 (2012). [*Milot v Dep't of Transp*, — Mich. App. ——, ——; — N.W.2d —— (2016); slip op at 2 (Docket No. 329728).]

The Governmental Tort Liability Act ("GTLA"), MCL 691.1401 *et seq.*, provides "broad immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function ...." *Milot*, — Mich. App. at ——; slip op at 2. Consequently, a plaintiff may only sue a governmental entity in tort if the suit falls within one of six statutory exceptions. *Id.* Those exceptions include the highway exception, MCL 691.1402, the motor-vehicle exception, MCL 691.1405, the public-building exception, MCL 691.1406, the propriety-function exception, MCL 691.1413, the governmental-hospital exception, MCL 691.1407(4), and the sewage-disposal-system-event exception, MCL 691.1417(2) and (3). *Hannay v Dep't of Transp*, 497 Mich. 45, 60 n 34; 860 N.W.2d 67 (2014). This Court broadly construes the scope of governmental immunity and narrowly construes its exceptions. *Milot*, — Mich. App. at ——; slip op at 2.

To maintain an action against a government agency or its employees exercising a governmental function, a plaintiff *must* plead in avoidance of governmental immunity. *County Road Ass'n of Mich. v Governor*, 287 Mich. App. 95, 119; 782 N.W.2d 784 (2010). A plaintiff does so by asserting that a claim that fits within a statutory exception or by pleading facts that demonstrate that the alleged wrong occurred during the exercise or discharge of a nongovernmental function. *Kendricks v Rehfield*, 270 Mich. App. 679, 681; 716 N.W.2d 623 (2006). Here, as is evidenced by the quoted portion of plaintiffs' complaint above, plaintiffs did not plead in avoidance of governmental immunity. Indeed, it does not even appear that governmental immunity is acknowledged in the complaint. Nevertheless, plaintiffs argue, and the circuit court concluded, that some of or all of plaintiffs' claims survived summary disposition as unjust-enrichment claims. We do not agree. The phrase "unjust enrichment," or anything similar to that phrase, is not present in the complaint. In fact, the only mention of a "contract" is made in reference to "Flint's ... wholesale Detroit water purchase contract ...." While it is true that we look to the substance of a complaint rather than its form, *Adams v Adams (On Reconsideration)*, 276 Mich. App. 704, 710–711; 742 N.W.2d 399 (2007), we are of the view that neither the substance nor the form of the complaint at issue here includes an unjust-enrichment claim as argued by plaintiffs and found by the circuit court. Rather, it is quite apparent, at least in our view, that plaintiffs' claims constitute constitutional or tort claims based on alleged violations of various ordinance provisions, see *In re Bradley Estate*, 494 Mich. 367, 387; 835 N.W.2d 545 (2013) (providing that MCL 691.1407(1)'s reference to "tort liability," not "tort claim" or "tort action," reflects the Legislature's intent to apply governmental immunity based "on the *nature* of the liability rather than the type of action pleaded"), and the circuit court explicitly dismissed those claims:

> *5 The Court agrees with Defendants that the ordinances that they clearly violated do not create a private cause of action to recover money damages; so to the extent that Plaintiffs have alleged claims for money damages based on ordinance violations, this Court cannot grant relief on those claims because they do not exist.

Plaintiffs did not appeal that decision. We are therefore prohibited from granting any relief in that regard. See *Rohl v Leone*, 258 Mich. App. 72, 77 n 2; 669 N.W.2d 579 (2003) ("[A]n appeal is limited to the issues raised by the appellant, unless the appellee cross-appeals as provided in MCR 7.207.").

Moreover, even if a claim for unjust enrichment had been properly alleged, we are not convinced that such a claim could move forward under the facts and circumstances of this case. Michigan caselaw is clear in that there is a "strong presumption that statutes do not create contractual rights." *Studier v Mich. Pub Sch Employees' Retirement Bd*, 472 Mich. 642, 661; 698 N.W.2d 350 (2005). "In order for a statute to form the basis of

a contract, the statutory language must be plain and susceptible of no other reasonable construction than that the Legislature intended to be bound to a contract." *Id.* at 662 (citations and internal quotation marks omitted). "[I]n addition to the absence of such clear and unequivocal statutory language, the circumstances of a statute's passage may belie an intent to contract away governmental powers." *Id.* at 663 (citations and internal quotation marks omitted). These rules apply to ordinances as well. *Warren's Station, Inc v Bronson*, 241 Mich. App. 384, 388; 615 N.W.2d 769 (2000). On appeal, plaintiffs do not attempt to overcome this "strong presumption." *Studier*, 472 Mich. at 661. Rather, they seek to circumvent that presumption by arguing that various ordinance provisions created a claim for unjust enrichment, which is an implied *contractual* relationship between plaintiffs and the City of Flint. See *Karaus v Bank of New York Mellon*, 300 Mich. App. 9, 23; 831 N.W.2d 897 (2012) (providing that if a party satisfies the two elements of an unjust-enrichment claim, "the law will imply a contract to prevent the unjust enrichment."). We are simply unaware of any authority that would support the proposition that, where an ordinance or statutory provision does not create a contractual relationship, a party may nevertheless create one under the guise of unjust enrichment, which sounds in equity *and contract*. We therefore reject plaintiffs' argument in this regard.

Plaintiffs' other arguments on appeal do little to alter this conclusion. Plaintiffs argue that defendants' actions constitute "ultra vires misconduct," that various bondholders have claims against defendants, and that replevin applies. These arguments are so far removed from the claims alleged in plaintiffs' complaint and those addressed by the circuit court that we feel any attempt to address them would be inappropriate. Indeed, because they have not been adequately developed below or on appeal, we are prohibited from doing so. See *Rohl*, 258 Mich. App. at 77 n 2. Plaintiffs also argue that this case is controlled by this Court's decision in *Trahey v Inkster*, 311 Mich. App. 582; 876 N.W.2d 582 (2015). However, *Trahey* supports defendants', not plaintiffs', position in this case. Indeed, in that case, a case where the plaintiffs challenged an increase in water and sewer rates as being unreasonable and constituting unjust enrichment, this Court expressly reversed the trial court's verdict in the plaintiffs' favor. *Id.* at 598. Specifically, it "reverse[d] the trial court's determination regarding the rates and remand[ed] for entry of a judgment of no cause of action in favor of the city with respect to plaintiff's claim that the water and sewer rates violated the Inkster Charter" and "reverse[d] the trial court's unjust-enrichment finding, which was predicated on the court's erroneous evaluation of the water and sewer rates." *Id.* There is no reason why the same should not also prove true in this case.

***6** Finally, plaintiffs' claims in this case have, for all intents and purposes, already been addressed and rejected by a panel of this Court in a published, and thus binding, decision. MCR 7.215(J)(1). In *Kincaid v Flint*, 311 Mich. App. 76, 82–83; 874 N.W.2d 193 (2015), this Court addressed the following three issues:

> (1) water and sewer rate increases that occurred ... in September 2011 were not authorized by defendant's ordinances, (2) [the emergency manager] did not have the authority to ratify [the] unauthorized increases and then further increase water and sewer rates in violation of the same ordinances, and (3) defendant wrongly deposited funds from water and sewer revenue into a single pooled cash account.

This Court summarized those issues as follows: "The essence of this case is a claim that the rate increases in September 2011 were made contrary to defendant's Ordinances §§ 46–52.1 and 46–57.1, and a claim that defendant had illegally pooled the monies collected for the water and sewer funds and used them to pay general obligations ...." *Id.* at 79. This Court expressly rejected that claim, concluding that "Plaintiffs' argument that the increases also violated Ordinance 46–52.1 by increasing the water rates above 8% is not supported by the language of the ordinance," *id.* at 84, and that plaintiffs' argument "that defendant illegally commingled funds" had "no merit," *id.* at 92. The claims at issue in this case, with the exception of the newly raised concept of unjust enrichment, are, in essence, the same, and there is nothing in the record in this case or in *Kincaid* to suggest that a different outcome would be appropriate here. Therefore, summary disposition in defendants' favor with respect to all claims is ultimately appropriate. The only reason a remand was deemed necessary in *Kincaid* was to allow the plaintiffs an opportunity to amend their complaint; however, in this case, unlike in *Kincaid*, a motion to amend the complaint has not been filed. *Id.* at 94–95.

Consequently, there is no denial of such a decision for this Court to evaluate.

Reversed and remanded for entry of an order granting summary disposition pursuant to MCR 2.116(C)(7) in defendants' favor. We do not retain jurisdiction.

All Citations

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